

UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior_____ Cecil D. Andrus

Office of Hearings and Appeals_____ Ruth R. Banks, Director

Office of the Solicitor_____ Leo M. Krulitz, Solicitor

**DECISIONS
OF THE
UNITED STATES
DEPARTMENT OF THE INTERIOR**

EDITED BY

BETTY H. PERRY



VOLUME 86

JANUARY—DECEMBER 1979

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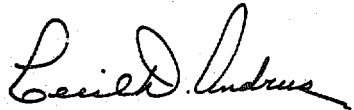
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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1979 to December 31, 1979. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Cecil D. Andrus, served as Secretary of the Interior during the period covered by this volume; Mr. James A. Joseph served as Under Secretary; Ms. Joan Davenport, Messrs. Robert Herbst, Guy Martin, Larry Meierotto, Forrest Girard served as Assistant Secretaries of the Interior; Mr. Leo Krulitz, served as Solicitor. Ms. Ruth R. Banks, served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "86 I.D."



Cecil D. Andrus
Secretary of the Interior.

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ERRATA :

Page 3—Right col., line 2, correct to : Stat. 189, 224),

Page 30—Right col., 4th line from bottom of page, correct date to read : Aug. 4, 1976,

Page 257—Left col., headnote 2, the first line is not included. Headnote should start with : *Application by the State of Alaska for lands under the*

Page 295—Left col., par. 1, line 4, correct to read : 42 U.S.C. 4321 *et seq.*

Page 302—Footnote 14, para. 2, line 4, correct to read : 92 Stat. 3206 Nov. 9, 1978.

Page 362—Left col., par. 1, lines 8 & 9, correct to read : 34 Stat. 197 as amended by

Page 435—Right col., 4th par. (2nd quoted par.) delete 4th sentence so it will read : [U]nder Section 349 [25 U.S.C.] it is obvious that the Secretary of the Interior patent in fee simple to a trust allottee ought to be satisfied not only that the allottee is competent and capable of managing his or her affairs, but also that it would be to the best interest of the allottee for the allottee to become emancipated from the exclusive jurisdiction of the United States and become subject to the laws of the state in which he resides.

Page 629—Right col., 2d para., line 26 & 27, correct citation to read : Solicitor's Opinion, 74 I.D. 285 (1967)

Page 688—Left col., 4th line from top of page, correct to read : history of 23 U.S.C. § 131 (1976)

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Adler Construction Co., 67 I.D. 21 (1960) (Reconsideration)

Adler Construction Co. v. U.S., Cong. 10-60. Dismissed, 423 F. 2d 1362 (1970); rehearing denied, July 15, 1970; cert. denied, 400 U.S. 993 (1970); rehearing denied, 401 U.S. 949 (1971).

Adler Construction Co. v. U.S., Cong. 5-70. Trial Commr's. report accepting & approving the stipulated agreement filed Sept. 11, 1972.

Estate of John J. Akers, 1 IBIA 8; 77 I.D. 268 (1970)

Dolly Cusker Akers v. The Dept. of the Interior, Civil No. 907, D. Mont. Judgment for defendant, Sept. 17, 1971; order staying execution of judgment for 30 days issued Oct. 15, 1971; appeal dismissed for lack of prosecution, May 3, 1972; appeal reinstated, June 29, 1972; aff'd, 499 F. 2d 44 (9th Cir. 1974).

State of Alaska, Andrew Kalerak, Jr., 73 I.D. 1 (1966)

Andrew J. Kalerak, Jr., et al. v. Stewart L. Udall, Civil No. A-35-66, D. Alaska. Judgment for plaintiff, Oct. 20, 1966, rev'd, 396 F. 2d 746 (9th Cir. 1968); cert. den., 393 U.S. 1118 (1969).

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Allied Contractors, Inc. 68 I.D. 145 (1961)

Allied Contractors, Inc. v. U.S., Ct. Cl. No. 163-64. Stipulation of settlement filed Mar. 3, 1967; compromised.

American Coal Co., 84 I.D. 394 (1977)

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Armco Steel Corp., 84 I.D. 454 (1977)

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Atlantic Richfield Co., Marathan Oil Co., 81 I.D. 457 (1974)

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Atlantic Richfield Co. & Pasco, Inc. v. Rogers C. B. Morton, Secretary of the Interior, Vincent E. McKelvey, Dir. of Geological Survey, & C. J. Curtis, Area O&G Supervisor, Geological Survey, Civil No. C74-181, D. Wyo.

Actions consolidated; judgment for Plaintiff, 407 F. Supp. 1301 (1975); aff'd, 556 F. 2d 982 (10th Cir. 1977).

Leslie N. Baker et al., A-28454 (Oct. 26, 1960). On reconsideration
Autrice C. Copeland, 69 I.D. 1 (1962)

Autrice Copeland Freeman v. Stewart L. Udall, Civil No. 1578, D. Ariz. Judgment for defendant, Sept. 3, 1963 (opinion); aff'd, 366 F. 2d 706 (9th Cir. 1964); no petition.

Phil Baker, 84 I.D. 877 (1977)

Phil Baker v. Department of the Interior, No. 77-1973, United States Ct. of Appeals, D.C. Cir. Aff'd in part & rev'd in part, Nov. 29, 1978.

Max Barash, The Texas Co., 63 I.D. 51 (1956)

Max Barash v. Douglas McKay, Civil No. 939-56. Judgment for defendant, June 13, 1977; rev'd & remanded, 256 F. 2d 714 (1958); judgment for plaintiff, Dec. 18, 1958. Supplemental decision, 66 I.D. 11 (1958); no petition.

Barnard-Curtiss Co., 64 I.D. 312 (1957); 65 I.D. 49 (1958)

Barnard-Curtiss Co. v. U.S., Ct. Cl. No. 491-59. Judgment for plaintiff, 301 F. 2d 909 (1962).

Eugenia Bate, 69 I.D. 230 (1962)

Katherine S. Foster & Brook H. Duncan II v. Stewart L. Udall, Civil No. 5258, D.N.M. Judgment for defendant, Jan. 8, 1964; rev'd, 335 F. 2d 828 (10th Cir. 1964); no petition.

Robert L. Beery et al., 25 IBLA 287; 83 I.D. 249 (1976)

J. A. Steele et al. v. Thomas S. Kleppe in his capacity as Secretary of the Interior, & U.S., Civil No. C76-1840, N.D. Cal. Aff'd, June 27, 1978; no appeal.

Sam Bergesen, 62 I.D. 295 (1955)

Reconsideration denied, IBCA-11 (Dec. 19, 1955)

Sam Bergesen v. U.S., Civil No. 2044, D. Wash. Complaint dismissed Mar. 11, 1958; no appeal.

Bishop Coal Co., 82 I.D. 553 (1975)

William Bennett, Paul F. Goad & United Mine Workers v. Thomas S. Kleppe, Secretary of the Interior, No. 75-2158, United States Ct. of Appeals, D.C. Cir. Suit pending.

BLM-A-045569, 70 I.D. 231 (1963)

New York State Natural Gas Corp. v. Stewart L. Udall, Civil No. 2109-63.

Consolidated Gas Supply Corp. v. Stewart L. Udall et al., Civil No. 2109-63. Judgment for defendant, Sept. 20, 1965; Per curiam decision, aff'd, Apr. 28, 1966; no petition.

Melvin A. Brown, 69 I.D. 131 (1962)

Melvin A. Brown v. Stewart L. Udall, Civil No. 3352-62. Judgment for defendant, Sept. 17, 1963; rev'd, 335 F. 2d 706 (1964); no petition.

R. C. Buch, 75 I.D. 140 (1968)

R. C. Buch v. Stewart L. Udall, Civil No. 68-1358-PH, C.D. Cal. Judgment for plaintiff, 298 F. Supp. 381 (1969); rev'd, 449 F. 2d 600 (9th Cir. 1971); Judgment for defendant, Mar. 10, 1972.

Bureau of Land Management v. Holland Livestock Ranch et al., 39 IBLA 272; 86 I.D. 133 (1979)

Holland Livestock Ranch, a Co-Partnership composed of Bright-Holland Co., Marimont-Holland Co., & Nemmeroff-Holland Co., & John J. Casey v. U.S., Cecil Andrus, Secretary of the Interior, Edward Roland, Cal. State Director, BLM, & Edward Hastey, Nevada State Dir., BLM, et al., Civil No. R-79-78-HEC, D. Nev. Suit pending.

The California Co., 66 I.D. 54 (1959)

The California Co. v. Stewart L. Udall, Civil No. 980-59. Judgment for defendant, 187 F. Supp. 445 (1960); aff'd, 296 F. 2d 384 (1961).

In the Matter of Cameron Parish, Louisiana, Cameron Parish Police Jury & Cameron Parish School Board, June 3, 1968, appealed by Secretary July 5, 1968, 75 I.D. 289 (1968)

Cameron Parish Police Jury v. Stewart L. Udall et al., Civil No. 14-206, W.D. La. Judgment for plaintiff, 302 F. Supp. 689 (1969); order vacating prior order issued Nov. 5, 1969.

James W. Canon et al., 84 I.D. 176 (1977)

Mark B. Ringstad, William I. Waugaman, William N. Allen III, Nils Braastad, Elmer Price, Dan Ramras, & Kenneth L. Rankin v. U.S., Secretary of the Interior, & The Arctic Slope Regional Corp., Civil No. A78-32-Civ. D. Alaska. Suit pending.

Canterbury Coal Co., 83 I.D. 325 (1976)

Canterbury Coal Co. v. Thomas S. Kleppe, No. 76-2323. United States Ct. of Appeals, 3d Cir. Aff'd, per curiam, June 15, 1977.

Carbon Fuel Co., 83 I.D. 39 (1976)

United Mine Workers of America v. Thomas S. Kleppe, No. 76-1208, United States Ct. of Appeals, D.C. Cir. Suit pending.

Carson Construction Co., 62 I.D. 422 (1955)

Carson Construction Co. v. U.S., Ct. Cl. No. 487-59. Judgment for plaintiff, Dec. 14, 1961; no appeal.

Chargeability of Acreage Embraced in Oil and Gas Lease Offers, 71 I.D. 337 (1964), *Shell Oil Co.*, A-30575 (Oct. 31, 1966)

Shell Oil Co. v. Udall, Civil No. 216-67. Stipulation of dismissal filed Aug. 19, 1968.

Chemi-Cote Perlite Corp. v. Arthur C. W. Bowen, 72 I.D. 403 (1965)

Bowen v. Chemi-Cote Perlite, No. 2 CA-Civ. 248, Ariz. Ct. App. Decision against the Dept. by the lower court aff'd, 423 P. 2d 104 (1967); rev'd., 432 P. 2d 435 (1967).

Stephen H. Clarkson, 72 I.D. 138 (1965)

Stephen H. Clarkson v. U.S. Cong. Ref. 5-68. Trial Commr's report adverse to U.S. issued Dec. 16, 1970; Chief Commr's report concurring with the Trial Commr's report issued Apr. 13, 1971. 85 Stat. 331, Aug. 11, 1971, enacted accepting the Chief Commr's report.

Appeals of COAC, Inc., 81 I.D. 700 (1974)

COAC, Inc. v. U.S., Ct. Cl. No. 395-75. Suit pending.

Mrs. Hannah Cohen, 70 I.D. 188 (1963)

Hannah and Abram Cohen v. U.S., Civil No. 3158, D.R.I. Compromised.

Barney R. Colson, 70 I.D. 409 (1963)

Barney R. Colson et al. v. Stewart L. Udall, Civil No. 63-26-Civ.-Oc. M.D. Fla. Dismissed with prejudice, 278 F. Supp. 826 (1968); aff'd, 428 F.2d 1046 (5th Cir. 1970); cert. denied, 401 U.S. 911 (1971).

Columbian Carbon Co., Merwin E. Liss, 63 I.D. 166 (1956)

Merwin E. Liss v. Fred A. Seaton, Civil No. 3233-56. Judgment for defendant, Jan. 9, 1958; appeal dismissed for want for prosecution, Sept. 18, 1958, D.C. Cir. No. 14,647.

Appeal by the Confederated Salish & Kootenai Tribes of the Flathead Reservation, in the Matter of the Enrollment of Mrs. Elverna Y. Clairmont Baciarelli, 77 I.D. 116 (1970)

Elverna Yevonne Clairmont Baciarelli v. Rogers C. B. Morton, Civil No. C-70-2200-SC, D. Cal. Judgment for defendant, Aug. 27, 1971; aff'd, 481 F. 2d 610 (9th Cir. 1973); no petition.

Appeal of Continental Oil Co., 68 I.D. 337 (1961)

Continental Oil Co. v. Stewart L. Udall et al., Civil No. 366-62. Judgment for defendant, Apr. 29, 1966; aff'd Feb. 10, 1967; *cert. den.*, 389 U.S. 839 (1967).

Estate of Hubert Franklin Cook, 5 IBIA 42; 83 I.D. 75 (1976)

Leroy V. & Roy H. Johnson, Marlene Johnson Eaendine & Ruth Johnson Jones v. Thomas S. Kleppe, Secretary of the Interior, Civil No. CIV-76-0362-E, W.D. Okla. Suit pending.

Autrice C. Copeland,

See Leslie N. Baker et al.

E. L. Cord, Donald E. Wheeler, Edward D. Neuhoﬀ, 80 I.D. 301 (1973)

Edward D. Neuhoﬀ & E. L. Cord v. Rogers C. B. Morton, Secretary of the Interior, Civil No. R-2921, D. Nev. Dismissed, Sept. 12, 1975 (opinion); aff'd, July 17, 1978; no petition.

Appeal of Cosmo Construction Co., 73 I.D. 229 (1966)

Cosmo Construction Co. et al. v. U.S., Ct. Cl. 119-68. Ct. opinion setting case for trial on the merits issued Mar. 19, 1971.

Cowin & Co. Inc., 83 I.D. 409 (1976)

United Mine Workers of America v. Thomas S. Kleppe, No. 76-1980, United States Ct. of Appeals, D.C. Cir. Suit pending.

Estate of Jonah Crosby (Deceased Wisconsin Winnebago Unallotted), 81 I.D. 279 (1974)

Robert Price v. Rogers C. B. Morton, Individually & in his official capacity as Secretary of the Interior & his successors in office, et al., Civil No. 74-0-189, D. Neb. Remanded to the Secretary for further administrative action, Dec. 16, 1975.

John C. deArmas, Jr., P. A. McKenna, 63 I.D. 82 (1956)

Patrick A. McKenna v. Clarence A. Davis, Civil No. 2125-56. Judgment for defendant, June 20, 1957; aff'd, 259 F. 2d 780 (1958); *cert. denied*, 358 U.S. 835 (1958).

H. R. Delasco, 39 IBLA 194; 84 I.D. 192 (1979)

Blanche V. White, 40 IBLA 152; 85 I.D. 408 (1979)

Stewart Capital Corp. et al. v. Cecil D. Andrus, Secretary of the Interior, Civil No. C79-123, D. Wyo. Suit pending.

The Dredge Corp., 64 I.D. 368 (1957) ; 65 I.D. 336 (1958)

The Dredge Corp. v. J. Russell Penny, Civil No. 475, D. Nev. Judgment for defendant, Sept. 9, 1964 ; aff'd, 362 F. 2d 889 (9th Cir. 1966) ; no petition. See also, *Dredge Co. v. Husite Co.*, 369 P. 2d 676 (1962) ; cert. den., 371 U.S. 821 (1962).

Eastern Associated Coal Corp., 82 I.D. 22 (1975)

International Union of United Mine Workers of America v. Rogers C. B. Morton, Secretary of the Interior, No. 75-1107, United States Ct. of Appeals, D.C. Cir. Dismissed by stipulation, Oct. 29, 1975.

Eastern Associated Coal Corp., 82 I.D. 311 (1975)

United Mine Workers of America v. Interior Board of Mine Operations Appeals, No. 75-1727, United States Ct. of Appeals, D.C. Cir. Petition for Review withdrawn, July 28, 1975.

Eastern Associated Coal Corp., 82 I.D. 506 (1975), Reconsideration, 83 I.D. 425 (1976), Aff'd en banc, 83 I.D. 695 (1976), 7 IBMA 152 (1976)

United Mine Workers of America v. Cecil D. Andrus, No. 77-1090, United States Ct. of Appeals, D.C. Cir. Voluntary dismissal, Apr. 4, 1977.

Appeal of Eklutna, Inc., 1 ANCAB 165 ; 83 I.D. 500 (1976)

State of Alaska v. Alaska Native Claims Appeal Board et al., Civil No. A76-236, D. Alaska. Suit pending.

David H. Evans v. Ralph C. Little, A-31044 (Apr. 10, 1970), 1 IBLA 269 ; 78 I.D. 47 (1971)

David H. Evans v. Rogers C. B. Morton, Civil No. 1-71-41, D. Idaho. Order granting motion of Ralph C. Little for leave to intervene as a party defendant issued June 5, 1972. Judgment for defendants, July 27, 1973 ; Aff'd, Mar. 12, 1975 ; no petition.

John J. Farrelly et al., 62 I.D. 1 (1955)

John J. Farrelly & The Fifty-One Oil Co. v. Douglas McKay, Civil No. 3037-55. Judgment for plaintiff, Oct. 11, 1955, no appeal.

Milton D. Feinberg, Benson J. Lamp, 37 IBLA 39 ; 85 I.D. 380 (1978) ; On Reconsideration, 40 IBLA 222 ; 86 I.D. 234 (1979)

Benson J. Lamp v. Cecil Andrus, Secretary of the Interior, James L. Bur-ski, Douglas E. Henriques & Edward W. Stuebing Administrative Judges, IBLA, Civil No. 79-1804. Suit pending.

Footo Mineral Co., 34 IBLA 285 ; 85 I.D. 171 (1978)

Footo Mineral Co. v. Cecil D. Andrus, Individ. & as Secretary of the Interior, H. William Menard, Individ. & as Director, Geological Survey, & Murray T. Smith, Individ. & as Area Mining Supervisor, Geological Survey, Civil No. LV-78-141 RDF, D. Nev. Dismissed without prejudice, Nov. 15, 1979, no appeal.

T. Jack Foster, 75 I.D. 81 (1968)

Gladys H. Foster, Executrix of the estate of T. Jack Foster v. Stewart L. Udall, Boyd L. Rasmussen, Civil No. 7611, D.N.M. Judgment for plaintiff, June 2, 1969; no appeal.

Franco Western Oil Co. et al., 65 I.D. 316, 427 (1958)

Raymond J. Hansen v. Fred A. Seaton, Civil No. 2810-59. Judgment for plaintiff, Aug. 2, 1960 (opinion); no appeal.

See Safarik v. Udall, 304 F. 2d 944 (1962); *cert. denied*, 371 U.S. 901 (1962).

Gabbs Exploration Co., 67 I.D. 160 (1960)

Gabbs Exploration Co. v. Stewart L. Udall, Civil No. 219-61. Judgment for defendant, Dec. 1, 1961; *aff'd*, 315 F. 2d 37 (1963); *cert. den.*, 375 U.S. 822 (1963).

Estate of Temens (Timens) Vivian Gardafée, 5 IBIA 113; 83 I.D. 216 (1976)

Confederated Tribes & Bands of the Yakima Indian Nation v. Thomas Kleppe, Secretary of the Interior, & Erwin Ray, Civil No. C-76-200, E.D. Wash. Suit pending.

Stanley Garthofner, Duwall Bros., 67 I.D. 4 (1960)

Stanley Garthofner v. Stewart L. Udall, Civil No. 4194-60. Judgment for plaintiff, Nov. 27, 1961; no appeal.

Estate of Gei-kaun-mah (Bert), 82 I.D. 408 (1975)

Juanita Geikaunmah Mammedaty & Imogene Geikaunmah Carter v. Rogers C. B. Morton, Secretary of the Interior, Civil No. CIV 75-1010-E, W.D. Okla. Judgment for defendant, 412 F. Supp. 283 (1973); no appeal.

General Excavating Co., 67 I.D. 344 (1960)

General Excavating Co. v. U.S., Ct. Cl. No. 170-62. Dismissed with prejudice Dec. 16, 1963.

Nelson A. Gerttula, 64 I.D. 225 (1957)

Nelson A. Gerttula v. Stewart L. Udall, Civil No. 685-60. Judgment for defendant, June 20, 1961; motion for rehearing denied, Aug. 3, 1961; *aff'd*, 309 F. 2d 653 (1962); no petition.

Charles B. Gonsales et al., Western Oil Fields, Inc., et al., 69 I.D. 236 (1962)

Pan American Petroleum Corp. & Charles B. Gonsales v. Stewart L. Udall, Civil No. 5246, D.N.M. Judgment for defendant, June 4, 1964; *aff'd*, 352 F. 2d 32 (10th Cir. 1965); no petition.

James C. Goodwin, 80 I.D. 7 (1973)

James C. Goodwin v. Dale R. Andrus, State Dir., Bureau of Land Management, Burton W. Silcock, Dir., Bureau of Land Management, & Rogers C. B. Morton, Secretary of the Interior, Civil No. C-5105, D. Colo. Dismissed. Nov. 29, 1975 (opinion); appeal dismissed, Mar. 9, 1976.

Gulf Oil Corp., 69 I.D. 30 (1962)

Southwestern Petroleum Corp. v. Stewart L. Udall, Civil No. 2209-62. Judgment for defendant, Oct. 19, 1962; aff'd, 325 F. 2d 633 (1963); no petition.

Guthrie Electrical Construction, 62 I.D. 280 (1955), IBCA-22 (Supp.) (Mar. 30 1956)

Guthrie Electrical Construction Co. v. U.S., Ct. Cl. No. 129-58. Stipulation of settlement filed Sept. 11, 1958. Compromised offer accepted and case closed Oct. 10, 1958.

L. H. Hagood et al., 65 I.D. 405 (1958)

Edwin Still et al. v. U.S., Civil No. 7897, D. Colo. Compromise accepted.

Raymond J. Hansen et al., 67 I.D. 362 (1960)

Raymond J. Hansen et al. v. Stewart L. Udall, Civil No. 3902-60. Judgment for defendant, June 23, 1961; aff'd, 304 F. 2d 944 (1962); cert. den., 371 U.S. 901 (1962).

Robert Schulein v. Stewart L. Udall, Civil No. 4131-60. Judgment for defendant, June 23, 1961; aff'd, 304 F. 2d 944 (1962); no petition.

Billy K. Hatfield et al. v. Southern Ohio Coal Co., 82 I.D. 289 (1975)

District 6 United Mine Workers of America et al. v. U.S. Dept. of Interior Board of Mine Operations Appeals, No. 75-1704, U.S. Court of Appeals, D.C. Cir. Board's decision aff'd, 562 F. 2d 1260 (1977).

Jesse Higgins, Paul Gower & William Gipson v. Old Ben Coal Corp., 81 I.D. 423 (1974)

Jesse Higgins et al. v. Cecil D. Andrus, No. 77-1363, United States Ct. of Appeals, D.C. Cir. Dismissed for lack of jurisdiction, June 20, 1977.

Kenneth Holt, an individual, etc., 68 I.D. 148 (1961)

Kenneth Holt, etc. v. U.S., Ct. Cl. No. 162-62. Stipulated judgment, July 2, 1965

Hope Natural Gas Co., 70 I.D. 228 (1963)

Hope Natural Gas Co. v. Stewart L. Udall, Civil No. 2132-63.

Consolidated Gas Supply Corp. v. Stewart L. Udall et al., Civil No. 2109-63. Judgment for defendant, Sept. 20, 1965; Per curiam decision, aff'd, Apr. 28, 1966; no petition.

Boyd L. Hulse v. William H. Griggs, 67 I.D. 212 (1960)

William H. Griggs v. Michael T. Solan, Civil No. 3741, D. Idaho. Stipulation for dismissal filed May 15, 1962.

Idaho Desert Land Entries—Indian Hill Group, 72 I.D. 156 (1965),
U.S. v. Ollie Mae Shearman et al.—Idaho Desert Land Entries—
Indian Hill Group, 73 I.D. 386 (1966)

Wallace Reed et al. v. Dept. of the Interior et al., Civil No. 1-65-86, D. Idaho. Order denying preliminary injunction, Sept. 3, 1965; dismissed, Nov. 10, 1965; amended complaint filed, Sept. 11, 1967.

U.S. v. Raymond T. Michener et al., Civil No. 1-65-93, D. Idaho. Dismissed without prejudice, June 6, 1966.

U.S. v. Hood Corp. et al., Civil No. 1-67-97, S.D. Idaho.

Civil Nos. 1-65-86 & 1-67-97 consolidated. Judgment adverse to U.S., July 10, 1970; reversed, 480 F. 2d 634 (9th Cir. 1973); *cert. denied*, 414 U.S. 1064 (1973). Dismissed with prejudice subject to the terms of the stipulation, Aug. 30, 1976.

*Appeal of Inter*Helo, Inc.*, IBCA-713-5-68 (Dec. 30, 1969), 82 I.D. 591 (1975)

John Billmeyer, etc. v. U.S., Ct. Cl. No. 54-74. Remanded with instructions to admit evidence, May 30, 1975.

Interpretation of the Submerged Lands Act, 71 I.D. 20 (1964)

Floyd A. Wallis v. Stewart L. Udall, Civil No. 3089-63. Dismissed with prejudice, Mar. 27, 1968.

C. J. Iverson, 82 I.D. 386 (1975)

C. J. Iverson v. Kent Frizzell, Acting Secretary of the Interior & Dorothy D. Rupe, Civil No. 75-106-Blg., D. Mont. Stipulation for dismissal with prejudice, Sept. 10, 1976.

J. A. Terteling & Sons, 64 I.D. 466 (1957)

J. A. Terteling & Sons v. U.S., Ct. Cl. No. 114-59. Judgment for defendant, 390 F. 2d 926 (1968); remaining aspects compromised.

J. D. Armstrong Co., 63 I.D. 289 (1956)

J. D. Armstrong, Inc. v. U.S., Ct. Cl. No. 490-56. Plaintiff's motion to dismiss petition allowed, June 26, 1959.

M. G. Johnson, 78 I.D. 107 (1971), *U.S. v. Menzel G. Johnson*, 16 IBLA 234 (1974)

Menzel G. Johnson v. Rogers C. B. Morton, Secretary of the Interior et al., Civil No. CN-LV-158, RDF, D. Nev. Judgment for defendant, Oct. 18, 1977; appeal filed Dec. 5, 1977.

June Oil & Gas, Inc., Cook Oil & Gas, Inc., 41 IBLA 394; 86 I.D. 374 (1979)

June Oil & Gas, Inc. & Cook Oil & Gas, Inc. v. Cecil D. Andrus, Secretary of the Interior, et al., Civil No. 79-1334 D. Colo. Suit pending.

Estate of San Pierre Kilkakham (Sam E. Hill), 1 IBIA 299; 79 I.D. 583 (1972), 4 IBIA 242 (1975), 5 IBIA 12 (1976)

Christine Sam & Nancy Judge v. Thomas S. Kleppe, Secretary of the Interior, Civil No. C-76-14, E.D. Wash. Dismissed with prejudice.

Anquita L. Klunter et al., A-30483, Nov. 18, 1965

Sea Bobby Lee Moore et al.

Leo J. Kottas, Earl Lutzenhiser, 73 I.D. 123 (1966)

Earl M. Lutzenhiser and Leo J. Kottas v. Stewart L. Udall et al., Civil No. 1371, D. Mont. Judgment for defendant, June 7, 1968; aff'd, 432 F. 2d 328 (9th Cir. 1970); no petition.

Max L. Krueger, Vaughan B. Connelly, 65 I.D. 185 (1958)

Max Krueger v. Fred A. Seaton, Civil No. 3106-58. Complaint dismissed by plaintiff, June 22, 1959.

W. Dalton La Rue, Sr., 69 I.D. 120 (1962)

W. Dalton La Rue, Sr. v. Stewart L. Udall, Civil No. 2784-62. Judgment for defendant, Mar. 6, 1963; aff'd, 324 F. 2d 428 (1963); cert. den., 376 U.S. 907 (1964).

L. B. Samford, Inc., 74 I.D. 86 (1967)

L. B. Samford, Inc. v. U.S., Ct. Cl. No. 393-67. Dismissed, 410 F. 2d 782 (1969); no petition.

Charles Lewellen, 70 I.D. 475 (1963)

Bernard E. Darling v. Stewart L. Udall, Civil No. 474-64. Judgment for defendant, Oct. 5, 1964; appeal voluntarily dismissed, Mar. 26, 1965.

Administrative Appeal of Ruth Pinto Lewis v. Superintendent of the Eastern Navajo Agency, 4 IBIA 147; 82 I.D. 521 (1975)

Ruth Pinto Lewis, Individually & as the Administrator of the Estate of Ignacio Pinto v. Thomas S. Kleppe, Secretary of the Interior, & U.S., Civil No. CIV-76-223 M, D.N.M. Judgment for plaintiff, July 21, 1977; no appeal.

Milton H. Lichtenwalner et al., 69 I.D. 71 (1962)

Kenneth McGahan v. Stewart L. Udall, Civil No. A-21-63, D. Alaska. Dismissed on merits, Apr. 24, 1964; stipulated dismissal of appeal with prejudice, Oct. 5, 1964.

Merwin E. Liss et al., 70 I.D. 231 (1963)

Hope Natural Gas Co. v. Stewart L. Udall, Civil No. 2132-63.

Consolidated Gas Supply Corp. v. Stewart L. Udall et al., Civil No. 2109-63. Judgment for defendant, Sept. 20, 1965; per curiam dec., aff'd, Apr. 28, 1966; no petition.

Bess May Lutey, 76 I.D. 37 (1969)

Bess May Lutey et al. v. Dept. of Agriculture, BLM, et al., Civil No. 1817, D. Mont. Judgment for defendant, Dec. 10, 1970; no appeal.

Elgin A. McKenna Execlutrix, Estate of Patrick A. McKenna, 74 I.D. 133 (1967)

Mrs. Elgin A. McKenna as Execlutrix of the Estate of Patrick A. McKenna, Deceased v. Udall, Civil No. 2001-67. Judgment for defendant, Feb. 14, 1968; aff'd, 418 F. 2d 1171 (1969) ; no petition.

Mrs. Elgin A. McKenna, Widow and Successor in Interest of Patrick A. McKenna, Deceased v. Walter J. Hickel, Secretary of the Interior, et al., Civil No. 2401, D. Ky. Dismissed with prejudice, May 11, 1970.

A. G. McKinnon, 62 I.D. 164 (1955)

A. G. McKinnon v. U.S., Civil No. 9433, D. Ore. Judgment for plaintiff, 178 F. Supp. 913 (1959) ; rev'd, 289 F. 2d 908 (9th Cir. 1961).

Estate of Elizabeth C. Jensen McMaster, 5 IBIA 61; 83 I.D. 145 (1976)

Raymond C. McMaster v. U.S. Dept. of the Interior, Secretary of the Interior & Bureau of Indian Affairs, Civil No. C76-129T, W.D. Wash. Dismissed, June 29, 1978.

Wade McNeil et al., 64 I.D. 423 (1957)

Wade McNeil v. Fred A. Seaton, Civil No. 648-58. Judgment for defendant, June 5, 1959 (opinion) ; rev'd, 281 F. 2d 931 (1960) ; no petition.

Wade McNeil v. Albert K. Leonard et al., Civil No. 2226, D. Mont. Dismissed, 199 F. Supp. 671 (1961) ; order, Apr. 16, 1962.

Wade McNeil v. Stewart L. Udall, Civil No. 678-62. Judgment for defendant, Dec. 13, 1963 (opinion) ; aff'd, 340 F. 2d 801 (1964) ; *cert. den.*, 381 U.S. 904 (1965).

Marathon Oil Co., 81 I.D. 447 (1974), *Atlantic Richfield Co., Marathon Oil Co.*, 81 I.D. 457 (1974)

Marathon Oil Co. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. C 74-179, D. Wyo.

Marathon Oil Co. v. Rogers C. B. Morton, Secretary of Interior, et al., Civil No. C 74-180, D. Wyo.

Atlantic Richfield Co. & Pasco, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. C 74-181, D. Wyo.

Actions consolidated; judgment for plaintiff, 407 F. Supp. 1301 (1975) ; aff'd, 556 F. 2d 982 (10th Cir. 1977).

Salvatore Megna, Guardian, Philip T. Garigan, 65 I.D. 33 (1958)

Salvatore Megna, Guardian etc. v. Fred A. Seaton, Civil No. 468-58. Judgment for plaintiff, Nov. 16, 1959; motion for reconsideration denied, Dec. 2, 1959; no appeal.

Philip T. Garigan v. Stewart L. Udall, Civil No. 1577 Tux., D. Ariz. Preliminary injunction against defendant, July 27, 1966; supplemental dec. rendered Sept. 7, 1966; judgment for plaintiff, May 16, 1967; no appeal.

Meva Corp., 76 I.D. 205 (1969)

Meva Corp. v. U.S., Ct. Cl. No. 492-69. Judgment for plaintiff, 511 F. 2d 548 (1975).

Duncan Miller, Louise Cuccia, 66 I.D. 388 (1959)

Louise Cuccia & Shell Oil Co. v. Stewart L. Udall, Civil No. 562-60. Judgment for defendant, June 27, 1961; no appeal.

Duncan Miller, 70 I.D. 1 (1963)

Duncan Miller v. Stewart L. Udall, Civil No. 931-63. Dismissed for lack of prosecution, Apr. 21, 1966; no appeal.

Duncan Miller, Samuel W. McIntosh, 71 I.D. 121 (1964)

Samuel W. McIntosh v. Stewart L. Udall, Civil No. 1522-64. Judgment for defendant, June 29, 1965; no appeal.

Duncan Miller, A-30546 (Aug. 10, 1966), A-30566 (Aug. 11, 1966), and 73 I.D. 211 (1966)

Duncan Miller v. Udall, Civil No. C-167-66, D. Utah. Dismissed with prejudice, Apr. 17, 1967; no appeal.

Bobby Lee Moore et al., 72 I.D. 505 (1965); *Anquita L. Kluentner et al.*, A-30483 (Nov. 18, 1965)

Gary Carson Lewis, etc., et al. v. General Services Administration et al., Civil No. 3253 S.D. Cal. Judgment for defendant, Apr. 12, 1965; aff'd, 377 F.2d 499 (9th Cir. 1967); no petition.

Henry S. Morgan et al., 65 I.D. 369 (1958)

Henry S. Morgan v. Stewart L. Udall, Civil No. 3248-59. Judgment for defendant, Feb. 20, 1961 (opinion); aff'd, 306 F. 2d 799 (1962); *cert. den.*, 371 U.S. 941 (1962).

Morrison-Knudsen Co., Inc., 64 I.D. 185 (1957)

Morrison-Knudsen Co. v. U.S., Ct. Cl. No. 239-61. Remanded to Trial Comm'r, 345 F. 2d 833 (1965); Comm'r's report adverse to U.S. issued June 20, 1967; judgment for plaintiff, 397 F. 2d 826 (1968); part remanded to the Board of Contract Appeals; stipulated dismissal on Oct. 6, 1969; judgment for plaintiff, Feb. 17, 1970.

Glenn Munsey v. Smitty Baker Coal Co., Ralph Baker, Smitty Baker, & P & P Coal Co., 84 I.D. 336 (1977)

Glenn Munsey v. Cecil D. Andrus, No. 77-1619, United States Ct. of Appeals, D.C. Cir. Suit pending.

Navajo Tribe of Indians v. State of Utah, 80 I.D. 441 (1973)

Navajo Tribe of Indians v. Rogers C. B. Morton, Secretary of the Interior, Joan B. Thompson, Martin Ritvo & Frederick Fishman, members of the Board of Land Appeals, Dept. of the Interior, Civil No. C-308-73, D. Utah. Dismissed with prejudice, Jan. 4, 1979.

Richard L. Oelschlaeger, 67 I.D. 237 (1960)

Richard L. Oelschlaeger v. Stewart L. Udall, Civil No. 4181-60. Dismissed, Nov. 15, 1963; case reinstated, Feb. 19, 1964; remanded, Apr. 4, 1967; rev'd & remanded with directions to enter judgment for appellant, 389 F. 2d 974 (1968); *cert. den.* 392 U.S. 909 (1968):

Oil and Gas Leasing on Lands Withdrawn by Executive Orders for Indian Purposes in Alaska, 70 I.D. 166 (1963)

Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. 760-63, D. Alaska. Withdrawn, Apr. 18, 1963.

Superior Oil Co. v. Robert L. Bennett, Civil No. A-17-63, D. Alaska. Dismissed, Apr. 23, 1963.

Native Village of Tyonek v. Robert L. Bennett, Civil No. A-15-63, D. Alaska. Dismissed, Oct. 11, 1963.

Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. A-20-63, D. Alaska. Dismissed, Oct. 29, 1963 (oral opinion); *aff'd*, 332 F. 2d 62 (9th Cir. 1964); no petition.

George L. Gucker v. Stewart L. Udall, Civil No. A-39-63, D. Alaska. Dismissed without prejudice, Mar. 2, 1964; no appeal.

Oil Resources, Inc., 28 IBLA 394; 84 I.D. 91 (1977)

Oil Resources, Inc. v. Cecil D. Andrus, Secretary of the Interior, Civil No. C-77-0147, D. Utah. Suit pending.

Old Ben Coal Corp., 81 I.D. 428, 436, 440 (1974)

Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals et al., Nos. 74-1654, 74-1655, 74-1656, United States Court of Appeals for the 7th Cir. Board's decision *aff'd*, June 13, 1975; *reconsideration denied*, June 27, 1975.

Old Ben Coal Co., 82 I.D. 355 (1975)

United Mine Workers of America v. U.S. Interior Board of Mine Operations Appeals, No. 75-1852, United States Court of Appeals, D.C. Cir. Vacated & remanded with instructions to dismiss as moot, June 10, 1977.

Old Ben Coal Co., 84 I.D. 459 (1977)

United Mine Workers of America v. Cecil D. Andrus, No. 77-1840, United States Ct. of Appeals, D.C. Cir. Suit pending.

Appeal of Ounalashka Corp., 1 ANCAB 104; 83 I.D. 475 (1976)

Ounalashka Corp., for & on behalf of its Shareholders v. Thomas Kleppe, Secretary of Interior, & his successors & predecessors in office, et al., Civil No. A76-241 CIV, D. Alaska. Suit pending.

Jack W. Parks v. L & M Coal Corp., 83 I.D. 710 (1973)

Jack W. Parks v. Thomas S. Kleppe, No. 76-2052, United States Ct. of Appeals, D.C. Cir. Voluntary dismissal, May 4, 1977.

Paul Jarvis, Inc., 64 I.D. 285 (1957)

Paul Jarvis, Inc. v. U.S., Ct. Cl. No. 40-58. Stipulated judgment for plaintiff, Dec. 19, 1958.

Peter Kiewit Sons' Co., 72 I.D. 415 (1965)

Peter Kiewit Sons' Co. v. U.S., Ct. Cl. 129-66. Judgment for plaintiff, May 24, 1968.

Curtis D. Peters, 80 I.D. 595 (1973)

Curtis D. Peters v. U.S., Rogers C. B. Morton, as Secretary of the Interior, Civil No. C-75-0201 RFP, N.D. Cal. Judgment for defendant, Dec. 1, 1975; no appeal.

City of Phoenix v. Alvin B. Reeves et al., 81 I.D. 65 (1974)

Alvin B. Reeves, Genevieve C. Rippey, Leroy Reeves & Thelma Reeves, as heirs of A. H. Reeves, Deceased v. Rogers C. B. Morton, Secretary of the Interior, & The City of Phoenix, a municipal Corp., Civil No. 74-117 PHX-WPC, D. Ariz. Dismissed with prejudice, Aug. 9, 1974; reconsideration den., Sept. 24, 1974; no appeal.

Harold Ladd Pierce, 69 I.D. 14 (1962)

Duncan Miller v. Stewart L. Udall, Civil No. 1351-62. Judgment for defendant, Aug. 2, 1962; aff'd, 317 F. 2d 573 (1963); no petition.

Pocahontas Fuel Co., 83 I.D. 690 (1976)

Howard Mullins v. Cecil D. Andrus, No. 77-1087. United States Ct. of Appeals, D.C. Cir. Suit pending.

Pocahontas Fuel Co., 84 I.D. 489 (1977)

Pocahontas Fuel Co., Div. of Consolidation Coal Co. v. Cecil D. Andrus, No. 77-2239, United States Ct. of Appeals, 4th Cir. Suit pending.

Port Blakely Mill Co., 71 I.D. 217 (1964)

Port Blakely Mill Co. v. U.S., Civil No. 6205, W.D. Wash. Dismissed with prejudice, Dec. 7, 1964.

Estate of John S. Ramsey (Wap Tose Note) (Nez Perce Allottee No. 853, Deceased), 81 I.D. 298 (1974)

Clara Ramsey Scott v. U.S. & Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. 3-74-39, D. Idaho. Dismissed with prejudice, Aug. 11, 1975; no appeal.

Ray D. Bolander Co., 72 I.D. 449 (1965)

Ray D. Bolander Co. v. U.S., Ct. Cl. 51-56. Judgment for plaintiff, Dec. 13, 1968; subsequent Contract Officer's dec., Dec. 3, 1969; interim dec., Dec. 2, 1969; Order to Stay Proceedings until Mar. 31, 1970; dismissed with prejudice, Aug. 3, 1970.

Estate of Crawford J. Reed (Unallotted Crow No. 6412), 1 IBIA 326; 79 I.D. 621 (1972)

George Reed, Sr. v. Rogers C. B. Morton et al., Civil No. 1105, D. Mont. Dismissed, June 14, 1973; no appeal.

Reliable Coal Corp., 1 IBMA 97; 79 I.D. 139 (1972)

Reliable Coal Corp. v. Rogers C. B. Morton, Secretary of the Interior, et al., No. 72-1477 United States Ct. of Appeals, 4th Cir. Board's decision aff'd, 478 F. 2d 257 (4th Cir. 1973).

Republic Steel Corp., 82 I.D. 607 (1975)

Republic Steel Corp. v. Interior Board of Mine Operations Appeals, No. 76-1041, United States Ct. of Appeals, D.C. Cir. Rev'd & remanded, Feb. 22, 1978.

Richfield Oil Corp., 62 I.D. 269 (1955)

Richfield Oil Corp. v. Fred A. Seaton, Civil No. 3820-55. Dismissed without prejudice, Mar. 6, 1958; no appeal.

Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965), *Reconsideration denied* by letter decision dated June 23, 1967, by the Under Secretary.

Thomas M. Bunn v. Stewart L. Udall, Civil No. 2615-65. Remanded, June 28, 1966.

Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971); 2 IBIA 33, 80 I.D. 390 (1973)

Oneta Lamb Robedeaux et al. v. Rogers C. B. Morton, Civil No. 71-646, D. Okla. Dismissed, Jan. 11, 1973.

Houston Bus Hill v. Rogers C. B. Morton, Civil No. 72-376, W.D. Okla. Judgment for plaintiff, Oct. 29, 1973; amended judgment for plaintiff, Nov. 12, 1973; appeal dismissed, June 28, 1974.

Houston Bus Hill & Thurman S. Hurst v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 73-528-B, W.D. Okla. Judgment for plaintiff, Apr. 30, 1975; corrected judgment, May 2, 1975; per curiam dec., vacated & remanded, Oct. 2, 1975; judgment for plaintiff, Dec. 1, 1975.

Estate of Clark Joseph Robinson, 7 IBIA 74; 85 I.D. 294 (1978)

Rene Robinson, by & through her Guardian Ad Litem, Nancy Clifford v. Cecil Andrus, Secretary of the Interior, Gretchen Robinson, & Trixi Lynn Robinson Harris, Civil No. CIV-78-5097, D.S.D. Suit pending.

Rosebud Coal Sales Co., 37 IBLA 251; 85 I.D. 396 (1978)

Rosebud Coal Sales Co. v. Cecil D. Andrus, Secretary of the Interior, Frank Gregg, Director, Bureau of Land Management, & Maria B. Bohl, Chief, Land & Mining, Bureau of Land Management, Wyo., Civil No. C78-261, D. Wyo. Judgment for plaintiff, Oct. 17, 1979. No appeal.

Richard W. Rowe, Daniel Gaudiane, 82 I.D. 174 (1975)

Richard W. Rowe, Daniel Gaudiane v. Stanley K. Hathaway, in his official capacity as Secretary of the Interior, Civil No. 75-1152. Judgment for defendant, July 29, 1976.

San Carlos Mineral Strip, 69 I.D. 195 (1962)

James Houston Bowman v. Stewart L. Udall, Civil No. 105-63. Judgment for defendant, 243 F. Supp. 672 (1965); *aff'd, sub nom. S. Jack Hinton et al. v. Stewart L. Udall*, 364 F. 2d 676 (1966); *cert. denied*, 385 U.S. 878 (1966); supplemented by M-36767, Nov. 1, 1967.

Seal and Co., 68 I.D. 94 (1961)

Seal & Co. v. U.S., Ct. Cl. 274-62. Judgment for plaintiff, Jan. 31, 1964; no appeal.

Administrative Appeal of Sessions, Inc. (A Cal. Corp.) v. Vyola Olinger Ortner (Lessor), Lease No. PSL-33, Joseph Patrick Patencio (Lessor), Lease No. PSL-36, Larry Olinger (Lessor), Lease No. PSL-41, 81 I.D. 651 (1974)

Sessions, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. CV 74-3589 LTL, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Sessions, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. CV 74-3591 MML, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Sessions, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. CV 74-3590 FW, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Steve Shapiro v. Bishop Coal Co., 83 I.D. 59 (1976)

Bishop Coal Co. v. Thomas S. Kleppe, No. 76-1368, United States Ct. of Appeals, 4th Cir. Suit pending.

Shell Oil Co., A-30575 (Oct. 31, 1966), *Chargeability of Acreage Embraced in Oil & Gas Lease Offers*, 71 I.D. 337 (1964)

Shell Oil Co. v. Udall, Civil No. 216-67. Stipulated dismissal Aug. 19, 1968.

Sinclair Oil & Gas Co., 75 I.D. 155 (1968)

Sinclair Oil & Gas Co. v. Stewart L. Udall, Secretary of the Interior, et al., Civil No. 5277, D. Wyo. Judgment for defendant, *sub nom. Atlantic Richfield Co. v. Walter J. Hickel*, 303 F. Supp. 724 (1969); *aff'd*, 432 F. 2d 587 (10th Cir. 1970); no petition.

Charles T. Sink, 82 I.D. 535 (1975)

Charles T. Sink v. Thomas S. Kleppe, Secretary of the Interior—Mining Enforcement & Safety Administration (MESA), No. 75-1292, United States Ct. of Appeals for the 4th Cir. Vacated without prejudice to plaintiff's rights, 529 F. 2d 601 (4th Cir. 1975).

Southern Pacific Co., 76 I.D. 1. (1969)

Southern Pacific Co. v. Walter J. Hickel, Secretary of the Interior, Civil No. S-1274, D. Cal. Judgment for defendant, Dec. 2, 1970 (opinion); no appeal.

Southern Pacific Co., Louis G. Wedekind, 77 I.D. 177 (1970), 20 IBLA 365 (1975)

George C. Laden, Louis Wedekind, Mrs. Vern Lear, Mrs. Arda Fritz, & Helen Laden Wagner, heirs of George H. Wedekind, Deceased v. Rogers C. B. Morton, et al., Civil No. R-2858, D. Nev. On June 20, 1974, remanded for further agency proceedings as originally ordered in 77 I.D. 177; Dist. Ct. reserves jurisdiction; supplemental complaint filed, Aug. 1, 1975; judgment for defendant, Nov. 29, 1976; appeal filed Jan. 27, 1977.

Southwest Welding & Manufacturing Division, Yuba Consolidated Industries, Inc., 69 I.D. 173 (1962)

Southwest Welding v. U.S., Civil No. 68-1658-CC, C.D. Cal. Judgment for plaintiff, Jan. 14, 1970; appeal dismissed, Apr. 6, 1970.

Southwestern Petroleum Corp. et al., 71 I.D. 206 (1964)

Southwestern Petroleum Corp. v. Stewart L. Udall, Civil No. 5773, D.N.M. Judgment for defendant, Mar. 8, 1965; aff'd, 361 F. 2d 650 (10th Cir. 1966); no petition.

Standard Oil Co. of California et al., 76 I.D. 271 (1969)

Standard Oil Co. of California v. Walter J. Hickel et al., Civil No. A-159-69, D. Alaska Judgment for plaintiff, 317 F. Supp. 1192 (1970); aff'd, *sub nom. Standard Oil Co. of Cal. v. Rogers C. B. Morton et al.*, 450 F. 2d 493 (9th Cir. 1971); no petition.

Standard Oil Co. of Texas, 71 I.D. 257 (1964)

California Oil Co. v. Secretary of the Interior, Civil No. 5729, D.N.M. Judgment for plaintiff, Jan. 21, 1965; no appeal.

James K. Tallman, 68 I.D. 256 (1961)

James K. Tallman et al. v. Stewart L. Udall, Civil No. 1852-62. Judgment for defendant, Nov. 1, 1962 (opinion); rev'd, 324 F. 2d 411 (1963); *cert. granted*, 376 U.S. 961 (1964); Dist. Ct. aff'd, 380 U.S. 1 (1965); *rehearing denied*, 380 U.S. 989 (1965).

Texaco, Inc., 75 I.D. 8 (1968)

Texaco, Inc., a Corp. v. Secretary of the Interior, Civil No. 446-68. Judgment for plaintiff, 295 F. Supp. 1297 (1969); aff'd, in part & remanded, 437 F. 2d 636 (1970); aff'd in part & remanded, July 19, 1972.

Texas Construction Co., 64 I.D. 97 (1957), *Reconsideration denied*, IBCA-73 (June 18, 1957)

Texas Construction Co. v. U.S., Ct. Cl. No. 224-58. Stipulated judgment for plaintiff, Dec. 14, 1961.

Estate of John Thomas, Deceased, Cayuse Allottee No. 223 & Estate of Joseph Thomas, Deceased, Umatilla Allottee No. 877, 64 I.D. 401 (1957)

Joe Hayes v. Fred A. Seaton, Secretary of the Interior, Civil No. 859-581. Judgment for defendant, Sept. 18, 1958; aff'd, 270 F. 2d 319 (1959); *cert. denied*, 364 U.S. 814 (1960); *rehearing denied*, 364 U.S. 906 (1960).

Thor-Westcliffe Development, Inc., 70 I.D. 134 (1963)

Thor-Westcliffe Development, Inc. v. Stewart L. Udall, Civil No. 5343, D. N.M. Dismissed with prejudice, June 25, 1963.

See also:

Thor-Westcliffe Development, Inc. v. Stewart L. Udall, et al., Civil No. 2406-61. Judgment for defendant, Mar. 22, 1962; aff'd, 314 F. 2d 257 (1963); cert. denied, 373 U.S. 951 (1963).

Richard K. Todd et al., 68 I.D. 291 (1961)

Bert F. Duesing v. Stewart L. Udall, Civil No. 290-62. Judgment for defendant, July 17, 1962 (oral opinion); aff'd, 350 F. 2d 748 (1965); cert. denied, 383 U.S. 912 (1966).

Atwood et al. v. Stewart L. Udall, Civil Nos. 293-62-299-62, incl. Judgment for defendant, Aug. 2, 1962; aff'd, 350 F. 2d 748 (1965); no petition.

Appeal of Toke Cleaners, 81 I.D. 258 (1974)

Thom Properties, Inc. d/b/a Toke Cleaners & Launderers v. U.S., Department of the Interior, Bureau of Indian Affairs, Civil No. A3-74-99, D. N.D. Stipulation for dismissal & order dismissing case, June 16, 1975.

Estate of Phillip Tooisgah, 4 IBIA 189; 82 I.D. 541 (1975)

Jonathan Morris & Velma Tooisgah v. Thomas S. Kleppe, Secretary of the Interior, Civil No. CIV-76-0037-D, W.D. Okla. Suit pending.

Union Oil Co. Bid on Tract 228, Brazos Area, Texas Offshore Sale, 75 I.D. 147 (1968), 76 I.D. 69 (1969)

The Superior Oil Co. et al. v. Stewart L. Udall, Civil No. 1521-68. Judgment for plaintiff, July 29, 1968, modified, July 31, 1968; aff'd, 409 F. 2d 1115 (1969); dismissed as moot, June 4, 1969; no petition.

Union Oil Co. of California, Ramon P. Colvert, 65 I.D. 245 (1958)

Union Oil Co. of California v. Stewart L. Udall, Civil No. 3042-58. Judgment for defendant, May 2, 1960 (opinion); aff'd, 289 F. 2d 790 (1961); no petition.

Union Oil Co. of California et al., 71 I.D. 169 (1964), 72 I.D. 313 (1965)

Penelope Chase Brown et al. v. Stewart L. Udall, Civil No. 9202, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd, 406 F. 2d 759 (10th Cir. 1969); cert. granted, 396 U.S. 817 (1969); rev'd & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing en banc denied; cert. denied, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

Equity Oil Co. v. Stewart L. Udall, Civil No. 9462, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

Gabbs Exploration Co. v. Stewart L. Udall, Civil No. 9464, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

Harlan H. Hugg et al. v. Stewart L. Udall, Civil No. 9252, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

Barnette T. Napier et al. v. Secretary of the Interior, Civil No. 8691, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd, 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied*, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

John W. Savage v. Stewart L. Udall, Civil 9458, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

The Oil Shale Corp. et al. v. Secretary of the Interior, Civil No. 8680, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd, 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied*, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

The Oil Shale Corp. et al. v. Stewart L. Udall, Civil No. 9465, D. Colo. Order to Close Files & Stay Proceedings, Mar. 25, 1967.

Joseph B. Umpleby et al. v. Stewart L. Udall, Civil No. 8685, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd, 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd. & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied*, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

Union Oil Co. of California, a Corp. v. Stewart L. Udall, Civil No. 9461, D. Colo. Order to Close Files & Stay Proceedings, Mar. 25, 1967.

Union Oil Co. of California, 71 I.D. 287 (1964)

Union Oil Co. of California v. Stewart L. Udall, Civil No. 2595-64. Judgment for defendant, Dec. 27, 1965; no appeal.

Union Pacific R.R., 72 I.D. 76 (1965)

The State of Wyoming & Gulf Oil Corp. v. Stewart L. Udall, etc., Civil No. 4913, D. Wyo. Dismissed with prejudice, 255 F. Supp. 481 (1966); aff'd, 379 F. 2d 635 (10th Cir. 1967); *cert. denied*, 389 U.S. 985 (1967).

United Mine Workers of America v. Inland Steel Co., 83 I.D. 87 (1976)

United Mine Workers of America v. Thomas S. Kleppe, No. 76-1377, United States Ct. of Appeals, 7th Cir. Board's decision aff'd, 561 F. 2d 1258 (7th Cir. 1977).

United Mine Workers of America, Local Union No. 1993 v. Consolidation Coal Co., 84 I.D. 254 (1977)

Local Union No. 1993, United Mine Workers of America v. Cecil D. Andrus, No. 77-1582, United States Ct. of Appeals, D.C. Cir. Suit pending.

U.S. v. Alonzo A. Adams et al., 64 I.D. 221 (1957), A-27364 (July 1, 1957)

Alonzo A. Adams et al. v. Paul B. Witmer et al., Civil No. 1222-57-Y, S.D. Cal. Complaint dismissed, Nov. 27, 1957 (opinion); rev'd & remanded, 271 F. 2d 29 (9th Cir. 1958); on rehearing, appeal dismissed as to Witmer; petition for rehearing by Berriman denied, 271 F. 2d 37 (9th Cir. 1959).

U.S. v. Alonzo Adams, Civil No. 187-60-WM, S.D. Cal. Judgment for plaintiff, Jan. 29, 1962 (opinion); judgment modified, 318 F. 2d 861 (9th Cir. 1963); no petition.

U.S. v. E. A. & Esther Barrows, 76 I.D. 299 (1969)

Esther Barrows, as an individual & as Executrix of the Last Will of E. A. Barrows, Deceased v. Walter J. Hickel, Civil No. 70-215-CC, C.D. Cal. Judgment for defendant, Apr. 20, 1970; aff'd, 447 F. 2d 80 (9th Cir. 1971).

U.S. v. J. L. Block, 80 I.D. 571 (1973)

J. L. Block v. Rogers Morton, Secretary of the Interior, Civil No. LV-74-9, BRT, D. Nev. Judgment for defendant, June 6, 1975; rev'd & remanded with instructions to remand to the Secretary of the Interior, Mar. 29, 1977; no petition.

U.S. v. Lloyd W. Booth, 76 I.D. 73 (1969)

Lloyd W. Booth v. Walter J. Hickel, Civil No. 42-69, D. Alaska. Judgment for defendant, June 30, 1970; no appeal.

U.S. v. Alice A. & Carrie H. Boyle, 76 I.D. 61, 318 (1969), *Reconsideration denied*, Jan. 22, 1970

Alice A. & Carrie H. Boyle v. Rogers C. B. Morton, Secretary of the Interior, Civil No. Civ-71-491 Phx WEC, D. Ariz. Judgment for plaintiff, May 4, 1972; rev'd & remanded, 519 F. 2d 551 (9th Cir. 1975); *cert. denied*, 423 U.S. 1033 (1975).

U.S. v. R. W. Brubaker et al., A-30636 (July 24, 1968); 9 IBLA 281, 80 I.D. 261 (1973)

R. W. Brubaker, a/k/a Ronald W. Brubaker, B. A. Brubaker, a/k/a Barbara A. Brubaker, & William J. Mann, a/k/a W. J. Mann v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 73-1228 EC, C.D. Cal. Dismissed with prejudice, Aug. 13, 1973; aff'd, 500 F. 2d 200 (9th Cir. 1974); no petition.

U.S. v. Henrietta & Andrew Julius Bunkowski, 5 IBLA 102; 79 I.D. 43 (1972)

Henrietta & Andrew Julius Bunkowski v. L. Paul Applegate, District Manager, Bureau of Land Management, Thomas S. Kleppe, Secretary of the Interior, et al., Civil No. R-76-182-BRT, D. Nev. Suit pending.

U.S. v. Ford M. Converse, 72 I.D. 141 (1965)

Ford M. Converse v. Stewart Udall, Civil No. 65-581, D. Ore. Judgment for defendant, 262 F. Supp. 583 (1966); aff'd, 399 F. 2d 616 (9th Cir. 1968); *cert. denied*, 393 U.S. 1025 (1969).

U.S. v. Alvis F. Denison et al., 71 I.D. 144 (1964), 76 I.D. 233 (1969)

Marie W. Denison, individually & as Executrix of the Estate of Alvis F. Denison, Deceased v. Stewart L. Udall, Civil No. 963 D. Ariz. Remanded, 248 F. Supp. 942 (1965).

Leo E. Shoup v. Stewart L. Udall, Civil No. 5822-Phx., D. Ariz. Judgment for defendant, Jan. 31, 1972.

Reid Smith v. Stewart L. Udall, etc., Civil No. 1053, D. Ariz. Judgment for defendant, Jan. 31, 1972; aff'd, Feb. 1, 1974; *cert. denied*, Oct. 15, 1974.

U.S. v. Everett Foster et al., 65 I.D. 1 (1958)

Everett Foster et al. v. Fred A. Seaton, Civil No. 344-58. Judgment for defendants, Dec. 5, 1958 (opinion); aff'd, 271 F. 2d 836 (1959); no petition.

U.S. v. Golden Grigg et al., 82 I.D. 123 (1975)

Golden T. Grigg, LeFawn Grigg, Fred Baines, Otis H. Williams, Kathryn Williams, Lovell Taylor, William A. Anderson, Saragene Smith, Thomas M. Anderson, Bonnie Anderson, Charles L. Taylor, Darlene Baines, Luann & Paul E. Hogg v. U.S., Rogers C. B. Morton, Secretary of the Interior, Civil No. 1-75-75, D. Idaho. Judgment for defendant, Nov. 6, 1979.

U.S. v. Henault Mining Co., 73 I.D. 184 (1966)

Henault Mining Co. v. Harold Tysk, et al. Civil No. 634, D. Mont. Judgment for plaintiff, 271 F. Supp. 474 (1967); rev'd & remanded for further proceedings, 419 F. 2d 766 (9th Cir. 1969); *cert. denied*, 398 U.S. 950 (1970); judgment for defendant, Oct. 6, 1970.

U.S. v. Charles H. Henrikson et al., 70 I.D. 212 (1963)

Charles H. Henrikson et al. v. Stewart L. Udall et al., Civil No. 41749, N.D. Cal. Judgment for defendant, 229 F. Supp. 510 (1964); aff'd, 350 F. 2d 949 (9th Cir. 1965); *cert. denied*, 384 U.S. 940 (1966).

U.S. v. Humboldt Placer Mining Co. & Del De Rosier, 79 I.D. 709 (1972)

Humboldt Placer Mining Co. & Del De Rosier v. Secretary of the Interior, Civil No. S-2755, E.D. Cal. Dismissed with prejudice, June 12, 1974; aff'd, 549 F. 2d 622 (9th Cir. 1977); petition for cert. filed June 25, 1977.

U.S. v. Ideal Cement Co., 5 IBLA 235, 79 I.D. 117 (1972)

Ideal Basic Industries, Inc., formerly known as Ideal Cement Co. v. Rogers C. B. Morton, Civil No. J-12-72, D. Alaska. Judgment for defendant, Feb. 25, 1974; motion to vacate judgment denied, May 6, 1974; aff'd, 542 F. 2d 1364 (9th Cir. 1976).

U.S. v. Independent Quick Silver Co., 72 I.D. 367 (1965)

Independent Quick Silver Co., an Oregon Corp. v. Stewart L. Udall, Civil No. 65-590, D. Ore. Judgment for defendant, 262 F. Supp. 583 (1966); appeal dismissed.

U.S. v. Richard Dean Lance, 73 I.D. 218 (1936)

Richard Dean Lance v. Stewart L. Udall et al., Civil No. 1864, D. Nev. Judgment for defendant, Jan. 23, 1968; no appeal.

U.S. v. William A. McCall, Sr., The Dredge Corp., Estate of Olaf H. Nelson, Deceased, Small Tract Applicants Ass'n, Intervenor, 78 I.D. 71 (1971)

William A. McCall, Sr., The Dredge Corp. & Olaf H. Nelson v. John F. Boyles et al., Civil No. 74-68 (RDF), D. Nev. Judgment for defendant, June 8, 1976.

U.S. v. William A. McCall, Sr., Estate of Olaf Henry Nelson, Deceased, 7 IBLA 21; 79 I.D. 457 (1972)

William A. McCall, Sr. & the Estate of Olaf Henry Nelson, Deceased v. John S. Boyles, District Manager, Bureau of Land Management, Thomas S. Kleppe, Secretary of Interior, et al., Civil No. LV-76-155 RDF, D. Nev. Judgment for defendant, Nov. 4, 1977; appeal filed.

U.S. v. Kenneth McClarty, 71 I.D. 331 (1964), 76 I.D. 193 (1969)

Kenneth McClarty v. Stewart L. Udall et al., Civil No. 2116, E.D. Wash. Judgment for defendant, May 26, 1966; rev'd & remanded, 408 F. 2d 907 (9th Cir. 1969); remanded to the Secretary, May 7, 1969; vacated & remanded to Bureau of Land Management, Aug. 13, 1969.

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- Atlantic and Pacific R.R. Co. (5 L.D. 269); overruled, 27 L.D. 241 (1898).
- Auerbach, Samuel H. (29 L.D. 208); overruled, 36 L.D. 36 (1907) (See 37 L.D. 715).
- Baca Float No. 3 (5 L.D. 705; 12 L.D. 676; 13 L.D. 624); vacated so far as in conflict, 29 L.D. 44 (1899).
- Bailey, John W. (3 L.D. 386); modified, 5 L.D. 513 (1887).
- Baker v. Hurst (7 L.D. 457); overruled, 8 L.D. 110 (1889) (See 9 L.D. 360).
- Barash, Max, 63 I.D. 51 (1956); was overruled in part by Solicitor's Opinion—Issuance of Noncompetitive Oil & Gas Leases on Lands within the Geologic Structures of Producing Oil or Gas Fields, M-36686, 74 I.D. 285 (1967); overruled, Permian Mud Service, Inc., 31 IBLA 150, 84 I.D. 342 (1977).
- Barbour v. Wilson (23 L.D. 462); vacated, 28 L.D. 62 (1899).
- Barbut, James (9 L.D. 514); overruled so far as in conflict, 29 L.D. 698 (1900).
- Barlow, S. L. M. (5 L.D. 695); *contra*, 6 L.D. 648 (1888).
- Barnhurst v. State of Utah (30 L.D. 314); modified, 47 L.D. 359 (1920).
- Bartch v. Kennedy (3 L.D. 437); overruled, 6 L.D. 217 (1887).
- Beery v. Northern Pacific Ry. Co. (41 L.D. 121); overruled, 43 L.D. 536 (1914).
- Bennet, Peter W. (6 L.D. 672); overruled, 29 L.D. 565 (1900).
- Bernardini, Eugene J. (62 I.D. 231); distinguished, 63 I.D. 102 (1956).
- Big Lark (48 L.D. 479); distinguished, 58 I.D. 680, 682 (1944).
- Birkholz, John (27 L.D. 59); overruled so far as in conflict, 43 L.D. 221 (1914).
- Birkland, Bertha M. (45 L.D. 104); overruled, 46 L.D. 110 (1917).
- Bivins v. Shelly (2 L.D. 282); modified, 4 L.D. 583 (1886).
- Black, L. C. (3 L.D. 101); overruled, 34 L.D. 606 (1906) (See 36 L.D. 14).
- Blenkner v. Sloggy (2 L.D. 267); overruled, 6 L.D. 217 (1887).
- Boeschen, Conrad William (41 L.D. 309); vacated, 42 L.D. 244 (1913).
- Bosch, Gottlieb (8 L.D. 45); overruled, 13 L.D. 42 (1891).
- Box v. Ulstein (3 L.D. 143); overruled, 6 L.D. 217 (1887).
- Boyle, William (38 L.D. 603); overruled so far as in conflict, 44 L.D. 331 (1915).
- Braasch, William C. and Christ C. Prange (48 L.D. 448); overruled so far as in conflict, 60 I.D. 417, 419.
- Bradford, J. L. (31 L.D. 132); overruled, 35 L.D. 399 (1907).
- Bradstreet v. Rehm (21 L.D. 30); reversed, 21 L.D. 544 (1895).
- Brady v. Southern Pacific R.R. Co. (5 L.D. 407 and 658); overruled, 20 L.D. 259 (1895).
- Brandt, William W. (31 L.D. 277); overruled, 50 L.D. 161 (1923).
- Braucht v. Northern Pacific Ry. Co. (43 L.D. 536, 538); modified, 44 L.D. 225 (1915).
- Brayton, Homer E. (31 L.D. 364); overruled so far as in conflict, 51 L.D. 305 (1925).
- Brick Pomeroy Mill Site (34 L.D. 320); overruled, 37 L.D. 674 (1909).
- Brown v. Cagle (30 L.D. 8); vacated, 30 L.D. 148 (1900) (See 47 L.D. 406).
- Brown, Joseph T. (21 L.D. 47); overruled so far as in conflict, 31 L.D. 222 (1902) (See 35 L.D. 399).
- Browning, John W. (42 L.D. 1); overruled so far as in conflict, 43 L.D. 342 (1914).
- Bruns, Henry A. (15 L.D. 170); overruled so far as in conflict, 51 L.D. 454 (1926).
- Bundy v. Livingston (1 L.D. 152); overruled, 6 L.D. 280, 284 (1887).
- Burdick, Charles W. (34 L.D. 345); modified, 42 L.D. 472 (1913).
- Burgess, Allen L. (24 L.D. 11); overruled so far as in conflict, 42 L.D. 321 (1913).

- Burkholder v. Skagen* (4 L.D. 166); overruled, 9 L.D. 153 (1889).
- Burnham Chemical Co. v. United States Borax Co.* (54 I.D. 183); overruled in substance, 58 I.D. 426, 429 (1944).
- Burns, Frank* (10 L.D. 365); overruled so far as in conflict, 51 L.D. 454 (1926).
- Burns v. Bergh's Heirs* (37 L.D. 161); vacated, 51 L.D. 268 (1925).
- Buttery v. Sprout* (2 L.D. 293); overruled, 5 L.D. 591 (1887).
- Cagle v. Mendenhall* (20 L.D. 447); overruled, 23 L.D. 533 (1896).
- Cain v. Addenda Mining Co.* (24 L.D. 18); vacated, 29 L.D. 62 (1899).
- California and Oregon Land Co.* (21 L.D. 344); overruled, 26 L.D. 453 (1898).
- California, State of* (14 L.D. 253); vacated, 23 L.D. 230 (1896).
- California, State of* (15 L.D. 10); overruled, 23 L.D. 423, 31 L.D. 335 (1902).
- California, State of* (19 L.D. 585); vacated, 28 L.D. 57 (1899).
- California, State of* (22 L.D. 428); overruled, 32 L.D. 34 (1903).
- California, State of* (32 L.D. 346); vacated, 50 L.D. 628 (1924) (See 37 L.D. 499 and 46 L.D. 396).
- California, State of* (44 L.D. 118); overruled, 48 L.D. 97, 98 (1921).
- California, State of* (44 L.D. 468); overruled, 48 L.D. 97, 98 (1921).
- California, State of v. Moccettini* (19 L.D. 359); overruled, 31 L.D. 335 (1902).
- California, State of v. Pierce* (9 C.L.O. 118); modified, 2 L.D. 854.
- California, State of v. Smith* (5 L.D. 543); overruled, 18 L.D. 343 (1894).
- Call v. Swain* (3 L.D. 46); overruled, 18 L.D. 373 (1894).
- Cameron Lode* (13 L.D. 369); overruled so far as in conflict, 25 L.D. 518 (1897).
- Camplan v. Northern Pacific R.R. Co.* (28 L.D. 118); overruled so far as in conflict, 29 L.D. 550 (1900).
- Case v. Church* (17 L.D. 578); overruled, 26 L.D. 453 (1898).
- Case v. Kupferschmidt* (30 L.D. 9); overruled so far as in conflict, 47 L.D. 406 (1920).
- Castello v. Bonnie* (20 L.D. 311); overruled, 22 L.D. 174 (1896).
- Cate v. Northern Pacific Ry. Co.* (41 L.D. 316); overruled so far as in conflict, 43 L.D. 60 (1914).
- Cawood v. Dumas* (22 L.D. 585); vacated, 25 L.D. 526 (1897).
- Centerville Mining and Milling Co.* (39 L.D. 80); no longer controlling, 48 L.D. 17 (1921).
- Central Pacific R.R. Co.* (29 L.D. 589); modified, 48 L.D. 58 (1921).
- Central Pacific R.R. Co. v. Orr* (2 L.D. 525); overruled, 11 L.D. 445 (1890).
- Chapman v. Willamette Valley and Cascade Mountain Wagon Road Co.* (13 L.D. 61); overruled, 20 L.D. 259 (1895).
- Chappell v. Clark* (27 L.D. 334); modified, 27 L.D. 532 (1898).
- Chicago Placer Mining Claim* (34 L.D. 9); overruled, 42 L.D. 453 (1913).
- Childress v. Smith* (15 L.D. 89); overruled, 26 L.D. 453 (1898).
- Christofferson, Peter* (3 L.D. 329); modified, 6 L.D. 284, 624.
- Claffin v. Thompson* (28 L.D. 279); overruled, 29 L.D. 693 (1900).
- Claney v. Ragland* (38 L.D. 550) (See 43 L.D. 485).
- Clark, Yulu S.* (A-22852) Feb. 20, 1941, unreported; overruled so far as in conflict, 59 I.D. 258, 260 (1946).
- Clarke, C. W.* (32 L.D. 233); overruled so far as in conflict, 51 L.D. 51 (1925).
- Cline v. Urban* (29 L.D. 96); overruled, 46 L.D. 492 (1918).
- Clipper Mining Co.* (22 L.D. 527); no longer followed in part, 67 I.D. 417 (1960).
- Clipper Mining Co. v. Eli Mining and Land Co.* (33 L.D. 660); no longer followed in part, 67 I.D. 417 (1960).

- Cochran v. Dwyer (9 L.D. 478) (See 39 L.D. 162, 225 (1910)).
- Coffin, Edgar A. (33 L.D. 245); overruled so far as in conflict, 52 L.D. 153 (1927).
- Coffin, Mary E. (34 L.D. 564); overruled so far as in conflict, 51 L.D. 51 (1925).
- Colorado, State of (7 L.D. 490); overruled, 9 L.D. 408 (1889).
- Computation of Royalty Under Sec. 15, 51 L.D. 283 (1925), overruled, Solicitor's Opinion—Response to Feb. 17, 1976, Request from the General Accounting Office: Interpretation of Mineral Leasing Act of 1920, and Outer Continental Shelf Lands Act Royalty Cause, M-36888 (Oct. 4, 1976), 84 L.D. 54 (1977).
- Condict, W. C. (A-23366) June 24, 1942, unreported; overruled so far as in conflict, 59 I.D. 258-260 (1946).
- Cook, Thomas C. (10 L.D. 324) (See 39 L.D. 162, 225 (1910)).
- Cooke v. Villa (17 L.D. 210); vacated, 19 L.D. 442 (1894).
- Cooper, John W. (15 L.D. 285); overruled, 25 L.D. 113 (1897).
- Copper Bullion and Morning Star Lode Mining Claims (35 L.D. 27); distinguished insofar as it applies to *ex parte* cases, 39 L.D. 574 (1911).
- Copper Glance Lode (29 L.D. 542); modified so far as in conflict, 55 I.D. 348 (1935).
- Cornlis v. Northern Pacific R.R. Co. (23 L.D. 265); vacated, 26 L.D. 652 (1898).
- Cornell v. Chilton (1 L.D. 153); overruled, 6 L.D. 483 (1888).
- Cowles v. Huff (24 L.D. 81); modified, 28 L.D. 515 (1899).
- Cox, Allen H. (30 L.D. 90, 468); vacated, 31 L.D. 114 (1901).
- Crowston v. Seal (5 L.D. 213); overruled, 18 L.D. 586 (1894).
- Culligan v. State of Minnesota (34 L.D. 22); modified, 34 L.D. 151 (1905).
- Cunningham, John (32 L.D. 207); modified, 32 L.D. 456 (1904).
- Bailey Clay Products Co. (48 L.D. 429, 431); overruled so far as in conflict, 50 L.D. 656 (1924).
- Dakota Central R.R. Co. v. Downey (8 L.D. 115); modified, 20 L.D. 131 (1895).
- Davis, E. W., A-29889 (Mar. 25, 1964), no longer followed in part; 80 I.D. 698 (1973).
- Davis, Heirs of (40 L.D. 573); overruled, 46 L.D. 110 (1917).
- DeLong v. Clarke (41 L.D. 278); modified so far as in conflict, 45 L.D. 54 (1916).
- Dempsey, Charles H. (42 L.D. 215); modified, 43 L.D. 300 (1914).
- Dennison and Willits (11 C.L.O. 261); overruled so far as in conflict, 26 L.D. 122 (1898).
- Deseret Irrigation Co. v. Sevier River Land and Water Co. (40 L.D. 463); overruled, 51 L.D. 27 (1925).
- Devoe, Lizzie A. (5 L.D. 4); modified, 5 L.D. 429 (1887).
- Dierks, Herbert (36 L.D. 367); overruled by the unreported case of Thomas J. Guigham, Mar. 11, 1909.
- Dixon v. Dry Gulch Irrigation Co. (45 L.D. 4); overruled, 51 L.D. 27 (1925).
- Douglas and Other Lodes (34 L.D. 556); modified, 43 L.D. 128 (1914).
- Dowman v. Moss (19 L.D. 526); overruled, 25 L.D. 82 (1897).
- Dudymott v. Kansas Pacific R.R. Co. (5 C.L.O. 69); overruled so far as in conflict, 1 L.D. 345.
- Dunphy, Elijah M. (8 L.D. 102); overruled so far as in conflict, 36 L.D. 561 (1908).
- Dyche v. Beleele (24 L.D. 494); modified, 43 L.D. 56 (1914).
- Dysart, Francis J. (23 L.D. 282); modified, 25 L.D. 188 (1897).
- Eastern Associated Coal Corp., 3 IBMA 331, 81 I.D. 567, 1974-75 OSHD par. 18,706 (1974); overruled in part by Alabama By-Products Corp. (On Recon.), 7 IBMA 85, 83 I.D. 574 (1976); overruled in part by Zeigler Coal Co., 7 IBMA 280, 84 I.D. 127 (1977).

- Eastern Associated Coal Corp., 5 IBMA 185, 82 I.D. 506, 1975-76 OSHD par. 20,041 (1975); set aside in part on reconsideration, 7 IBMA 14, 83 I.D. 425 (1976).
- Easton, Francis E. (27 L.D. 600); overruled, 30 L.D. 355 (1900).
- East-Tintic Consolidated Mining Co. (On Rehearing) (41 L.D. 255); vacated, 43 L.D. 80 (1914).
- Elliot v. Ryan (7 L.D. 322); overruled, 8 L.D. 10 (1889) (See 9 L.D. 360).
- El Paso Brick Co. (37 L.D. 155); overruled so far as in conflict, 40 L.D. 199 (1911).
- Elson, William C. (6 L.D. 797); overruled, 37 L.D. 330.
- Eklutna, Appeal of, 1 ANCAB 190, 83 I.D. 619 (1976), modified, Valid Existing Rights under the Alaska Native Claims Settlement Act, Sec. Order No. 3016, 85 I.D. 1 (1978).
- Emblen v. Weed (16 L.D. 28); modified, 17 L.D. 220 (1893).
- Epley v. Trick (8 L.D. 110); overruled, 9 L.D. 360.
- Erhardt, Finsans (36 L.D. 154); overruled, 38 L.D. 406 (1910).
- Esping v. Johnson (37 L.D. 709); overruled, 41 L.D. 289 (1912).
- Esplin, Lee J., 56 I.D. 325 (1938), overruled to extent it applies to 1926 Executive Order to artificially developed water sources on the public lands, by Solicitor's Opinion, M-36914, 86 I.D. 553 (1979), Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and the Bureau of Land Management.
- Ewing v. Rickard (1 L.D. 146); overruled, 6 L.D. 483 (1888).
- Falconer v. Price (19 L.D. 167); overruled, 24 L.D. 264 (1897).
- Fargo No. 2 Lode Claims (37 L.D. 404); modified, 43 L.D. 128; overruled so far as in conflict, 55 I.D. 348 (1935).
- Farrill, John W. (13 L.D. 713); overruled so far as in conflict, 52 L.D. 472, 473 (1928).
- Febes, James H. (37 L.D. 210); overruled, 43 L.D. 183 (1914).
- Federal Shale Oil Co. (53 I.D. 213); overruled so far as in conflict, 55 I.D. 287, 290 (1935).
- Ferrell v. Hoge (18 L.D. 81); overruled, 25 L.D. 351 (1897).
- Fette v. Christiansen (29 L.D. 710); overruled, 34 L.D. 167 (1905).
- Field, William C. (1 L.D. 68); overruled so far as in conflict, 52 L.D. 472, 473 (1928).
- Filtrol Co. v. Brittan and Echart (51 L.D. 649); distinguished, 55 I.D. 605 (1936).
- Fish, Mary (10 L.D. 606); modified, 13 L.D. 511 (1891).
- Fisher v. Heirs of Rule (42 L.D. 62, 64); vacated, 43 L.D. 217 (1914).
- Fitch v. Sioux City and Pacific R.R. Co. (216 L. and R. 184); overruled, 17 L.D. 43 (1893).
- Fleming v. Bowe (13 L.D. 78); overruled, 23 L.D. 175 (1896).
- Florida Mesa Ditch Co. (14 L.D. 265); overruled, 27 L.D. 421 (1898).
- Florida Railway and Navigation Co. v. Miller (3 L.D. 324); modified, 6 L.D. 716; overruled, 9 L.D. 237 (1889).
- Florida, State of (17 L.D. 355); reversed, 19 L.D. 76 (1894).
- Florida, State of (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291 (1925).
- Forgeot, Margaret (7 L.D. 280); overruled, 10 L.D. 629 (1890).
- Fort Boise Hay Reservation (6 L.D. 16); overruled, 27 L.D. 505 (1898).
- Franco Western Oil Co., 65 I.D. 316, modified, 65 I.D. 427 (1958).
- Freeman Coal Mining Co., 3 IBMA 434, 81 L.D. 723, 1974-1975 OSHD par. 19,177 (1974); overruled in part, Zeigler Coal Co., 7 IBMA 280, 84 I.D. 127 (1977).
- Freeman, Flossie (40 L.D. 106); overruled, 41 L.D. 63 (1912).
- Freeman v. Summers, 52 L.D. 201 (1927), is overruled; United States v. Winegar, Frank W., 16 IBLA 112, 81 I.D. 370 (1974).
- Freeman v. Texas and Pacific Ry. Co. (2 L.D. 550); overruled, 7 L.D. 13, 18 (1888).

- Fry, Silas A. (45 L.D. 20); modified, 51 L.D. 581 (1926).
- Fults, Bill, 61 I.D. 437 (1954); overruled, 69 I.D. 181 (1962).
- Galliher, Maria (8 C.L.O. 137); overruled, 1 L.D. 57 (1880).
- Gallup v. Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 303, 304 (1920).
- Gariss v. Borin (21 L.D. 542) (See 39 L.D. 162, 225).
- Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158 (1886).
- Garvey v. Tuiska (41 L.D. 510); modified, 43 L.D. 229 (1914).
- Gates v. California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336, 342 (1882).
- Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81 (1887).
- Glassford, A. W., 56 I.D. 88 (1937); overruled to extent inconsistent, 70 I.D. 159 (1963).
- Gleason v. Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422 (1947).
- Gohrman v. Ford (8 C.L.O. 6); overruled, 4 L.D. 580 (1886).
- Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250 (1908).
- Goldstein v. Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88 (1901).
- Goodale v. Olney (12 L.D. 324); distinguished, 55 I.D. 580 (1936).
- Gotego Townsite v. Jones (35 L.D. 18); modified, 37 L.D. 560 (1909).
- Gowdy v. Connell (27 L.D. 56); vacated, 28 L.D. 240 (1899).
- Gowdy v. Gilbert (19 L.D. 17); overruled, 26 L.D. 453 (1898).
- Gowdy v. Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191 (1897).
- Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495 (1897).
- Gregg v. State of Colorado (15 L.D. 151); vacated, 30 L.D. 310 (1900).
- Grinnel v. Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489 (1896).
- Ground Hog Lode v. Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568 (See R.R. Rouseau, 47 L.D. 590 (1920)).
- Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399 (1912).
- Gulf and Ship Island R.R. Co. (16 L.D. 236); modified, 19 L.D. 534 (1894).
- Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442 (1918).
- Gwyn, James R. (A-26806) Dec. 17, 1953, unreported; distinguished, 66 I.D. 275 (1959).
- Hagood, L. N., 65 I.D. 405 (1958); overruled, Beard Oil Co., 1 IBLA 42, 77 I.D. 166 (1970).
- Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505 (1912).
- Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59 (1899).
- Hardee, D. C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698 (1900).
- Hardee v. United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 698 (1900).
- Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233 (1892).
- Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93 (1910).
- Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539 (1905).
- Hart v. Cox (42 L.D. 592); vacated, 260 U.S. 427 (See 49 L.D. 413 (1923)).
- Hastings and Dakota Ry. Co. v. Christenson (22 L.D. 257); overruled, 28 L.D. 572 (1899).
- Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629 (1922).
- Hayden v. Jamison (24 L.D. 403); vacated, 26 L.D. 373 (1898).
- Haynes v. Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150 (1933).
- Heilman v. Syverson (15 L.D. 184); overruled, 23 L.D. 119 (1896).
- Heinzman v. Letroadec's Heirs (28 L.D. 497); overruled, 38 L.D. 253 (1909).
- Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110 (1917).
- Heirs of Mulnix, Philip (33 L.D. 331); overruled, 43 L.D. 532 (1915).

- Heirs of Stevenson *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).
- Heirs of Talkington *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200 (1892).
- Heirs of Vradenburg *v.* Orr (25 L.D. 323); overruled, 38 L.D. 253 (1909).
- Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472 (1913).
- Helphrey *v.* Coil (49 L.D. 624); overruled, Dennis *v.* Jean (A-20899), July 24, 1937, unreported.
- Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106. (1914) (See 44 L.D. 112 and 49 L.D. 484).
- Hennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211 (1910).
- Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 L.D. 275 (1959).
- Herman *v.* Chase (37 L.D. 590); overruled, 43 L.D. 246 (1914).
- Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113 (1897).
- Hickey, M. A. (3 L.D. 83); modified, 5 L.D. 256.
- Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17 (1917).
- Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191 (1914).
- Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538 (1914).
- Holbeck, Halvor F., A-30376 (Dec. 2, 1965); overruled, 79 I.D. 416 (1972).
- Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166 (1899).
- Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 433, 436 (1891).
- Holland, William C. (M-27696); decided Apr. 26, 1934; overruled in part, 5 I.D. 215, 221 (1935).
- Hollensteiner, Walter. (38 L.D. 319); overruled, 47 L.D. 260 (1919).
- Holman *v.* Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590 (1920).
- Hon. *v.* Martinas (41 L.D. 119); modified, 43 L.D. 196, 197 (1914).
- Hooper, Henry (6 L.D. 624); modified, 9 L.D. 86, 284 (1899).
- Howard *v.* Northern Pacific R.R. Co. (23 L.D. 6); overruled, 28 L.D. 126 (1899).
- Howard, Thomas (3 L.D. 409) (See 39 L.D. 162, 225 (1910)).
- Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204 (1899).
- Howell, L. C. (39 L.D. 92); in effect overruled (See 39 L.D. 411 (1910)).
- Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287 (1925).
- Hughes *v.* Greathhead (43 L.D. 497); overruled, 49 L.D. 413 (1923) (See 260 U.S. 427).
- Hull *v.* Ingle (24 L.D. 214); overruled, 30 L.D. 258 (1900).
- Huls, Clara (9 L.D. 401); modified, 21 L.D. 377 (1895).
- Humble Oil & Refining Co. (64 I.D. 5); distinguished, 65 I.D. 316 (1958).
- Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65 (1956).
- Hurley, Bertha C. (TA-66 (Ir.)), Mar. 21, 1952, unreported; overruled, 62 I.D. 12 (1955).
- Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284 (1899).
- Hyde, F. A. (40 L.D. 284); overruled, 43 L.D. 381 (1914).
- Hyde *v.* Warren (14 L.D. 576, 15 L.D. 415) (See 19 L.D. 64 (1894)).
- Ingram, John D. (37 L.D. 475) (See 43 L.D. 544 (1914)).
- Inman *v.* Northern Pacific R.R. Co. (24 L.D. 318); overruled, 28 L.D. 95 (1899).
- Instructions (4 L.D. 297); modified, 24 L.D. 45 (1897).
- Instructions (32 L.D. 604); overruled so far as in conflict, 50 L.D. 628; 53 I.D. 365; Lillian M. Peterson (A-20411), Aug. 5, 1937, unreported (See 59 I.D. 282, 286).
- Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36 (1932).
- Interstate Oil Corp. & Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 228 (1930).
- Iowa Railroad Land Co. (23 L.D. 79); (24 L.D. 125); vacated, 29 L.D. 79 (1899).

- Jacks v. Belard* (29 L.D. 369) ; vacated, 30 L.D. 345 (1900).
- Johnson v. South Dakota* (17 L.D. 411) ; overruled so far as in conflict, 41 L.D. 21, 22 (1912).
- Jones, James A.* (3 L.D. 176) ; overruled, 8 L.D. 448 (1889).
- Jones v. Kennett* (6 L.D. 688) ; overruled, 14 L.D. 429 (1892).
- Kackmann, Peter* (1 L.D. 86) ; overruled, 16 L.D. 463, 464 (1893).
- Kanawha Oil & Gas Co., Assignee* (50 L.D. 639) ; overruled so far as in conflict, 54 I.D. 371 (1934).
- Keating Gold Mining Co., Montana Power Co., Transferee*, 52 L.D. 671 (1929), overruled in part, *Arizona Public Service Co.*, 5 IBLA 137, 79 I.D. 67 (1972).
- Kemp, Frank A.* (47 L.D. 560) ; overruled so far as in conflict, 60 I.D. 417, 419 (1950).
- Kemper v. St. Paul & Pacific R.R. Co.* (2 C.L.L. 805) ; overruled, 18 L.D. 101 (1894).
- Kilner, Harold E.* (A-21845) ; Feb. 1, 1939, unreported ; overruled so far as in conflict, 59 I.D. 258, 260 (1946).
- King v. Eastern Oregon Land Co.* (23 L.D. 579) ; modified, 30 L.D. 19 (1900).
- Kinney, E. C.* (44 L.D. 580) ; overruled so far as in conflict, 53 I.D. 228 (1930).
- Kinsinger v. Peck* (11 L.D. 202) (See 39 L.D. 162, 225 (1910)).
- Kiser v. Keech* (7 L.D. 25) ; overruled, 23 L.D. 119 (1896).
- Knight, Albert B.* (30 L.D. 227) ; overruled, 31 L.D. 64 (1901).
- Knight v. Heirs of Knight* (39 L.D. 362, 491) ; 40 L.D. 461 ; overruled, 43 L.D. 242 (1914).
- Kniskern v. Hastings & Dakota R.R. Co.* (6 C.L.O. 50) ; overruled, 1 L.D. 362 (1883).
- Kolberg, Peter F.* (37 L.D. 453) ; overruled, 43 L.D. 181 (1914).
- Krighaum, James T.* (12 L.D. 617) ; overruled, 26 L.D. 448 (1898).
- Krushnic, Emil L.* (52 L.D. 282, 295) ; vacated, 53 I.D. 42, 45 (1930) (See 280 U.S. 306).
- Lackawanna Placer Claim* (36 L.D. 36) ; overruled, 37 L.D. 715 (1909).
- La Follette, Harvey M.* (26 L.D. 453) ; overruled so far as in conflict, 59 I.D. 416, 422 (1947).
- Lamb v. Ullery* (10 L.D. 528) ; overruled, 32 L.D. 331 (1903).
- Largent, Edward B.* (13 L.D. 397) ; overruled so far as in conflict, 42 L.D. 321 (1913).
- Larson, Syvert* (40 L.D. 69) ; overruled, 43 L.D. 242 (1914).
- Lasselle v. Missouri, Kansas & Texas Ry. Co.* (3 C.L.O. 10) ; overruled, 14 L.D. 278 (1892).
- Las Vegas Grant* (13 L.D. 646 ; 15 L.D. 58) ; revoked, 27 L.D. 683 (1898).
- Laughlin, Allen* (31 L.D. 256) ; overruled, 41 L.D. 361 (1912).
- Laughlin v. Martin* (18 L.D. 112) ; modified, 21 L.D. 40 (1895).
- Law v. State of Utah* (29 L.D. 623) ; overruled, 47 L.D. 359 (1920).
- Layne & Bowler Export Corp., IBCA-245* (Jan. 18, 1961), 68 I.D. 33, overruled in so far as it conflicts with *Schweigert, Inc. v. United States, Court of Claims, No. 26-66* (Dec. 15, 1967), and *Galland-Henning Manufacturing Company, IBCA-534-12-65* (Mar. 29, 1968).
- Leemons, Lawson H.* (19 L.D. 37) ; overruled, 26 L.D. 389 (1898).
- Leonard, Sarah* (1 L.D. 41) ; overruled, 16 L.D. 463, 464 (1893).
- Liability of Indian Tribes for State Taxes Imposed on Royalty Received from Oil and Gas Leases*, 58 I.D. 535 (1943) ; superseded to extent it is inconsistent with *Solicitor's Opinion—Tax Status of the Production of Oil and Gas from Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896*, 84 I.D. 905 (1977).
- Lindberg, Anna C.* (3 L.D. 95) ; modified, 4 L.D. 299 (1885).

- Linderman *v.* Wait (6 L.D. 689) ; overruled, 13 L.D. 459 (1891).
- Linhart *v.* Santa Fe Pacific R.R. Co. (36 L.D. 41) ; overruled, 41 L.D. 284 (See 43 L.D. 536 (1914)).
- Liss, Merwin E., Cumberland & Allegheny Gas Co., 67 I.D. 385 (1960), is overruled, 80 I.D. 395 (1973).
- Little Pet Lode (4 L.D. 17) ; overruled, 25 L.D. 550 (1897).
- Lock Lode (6 L.D. 105) ; overruled so far as in conflict, 26 L.D. 123 (1898).
- Lockwood, Francis A. (20 L.D. 361) ; modified, 21 L.D. 200 (1895).
- Loneragan *v.* Shockley (33 L.D. 238) ; overruled so far as in conflict, 34 L.D. 314 ; 36 L.D. 199 (1907).
- Louisiana, State of (8 L.D. 126) ; modified, 9 L.D. 157 (1889).
- Louisiana, State of (24 L.D. 231) ; vacated, 26 L.D. 5 (1898).
- Louisiana, State of (47 L.D. 366) ; overruled so far as in conflict, 51 L.D. 291 (1925).
- Louisiana, State of (48 L.D. 201) ; overruled so far as in conflict, 51 L.D. 291 (1925).
- Lucy B. Hussey Lode (5 L.D. 93) ; overruled, 25 L.D. 495 (1897).
- Luse, Jeanette L. (61 I.D. 103) ; distinguished by Richfield Oil Corp., 71 I.D. 243 (1964).
- Luton, James W. (34 L.D. 468) ; overruled so far as in conflict, 35 L.D. 102 (1906).
- Lyman, Mary O. (24 L.D. 493) ; overruled so far as in conflict, 43 L.D. 221 (1914).
- Lynch, Patrick (7 L.D. 33) ; overruled so far as in conflict, 13 L.D. 713 (1891).
- Mabel Lode, 26 L.D. 675 distinguished ; 57 I.D. 63 (1939).
- Madigan, Thomas (8 L.D. 188) ; overruled, 27 L.D. 448 (1898).
- Maginnis, Charles P. (81 L.D. 222) ; overruled, 35 L.D. 399 (1907).
- Maginnis, John S. (32 L.D. 14) ; modified (42 L.D. 472 (1913)).
- Maher, John M. (34 L.D. 342) ; modified, 42 L.D. 472 (1913).
- Mahoney, Timothy (41 L.D. 129) ; overruled, 42 L.D. 313 (1913).
- Makela, Charles (46 L.D. 509) ; extended, 49 L.D. 244 (1922).
- Makemson *v.* Snider's Heirs (22 L.D. 511) ; overruled, 32 L.D. 650 (1904).
- Malone Land & Water Co. (41 L.D. 138) ; overruled in part, 43 L.D. 110 (1914).
- Maney, John J. (35 L.D. 250) ; modified, 48 L.D. 153 (1921).
- Maple, Frank (37 L.D. 107) ; overruled, 43 L.D. 181 (1914).
- Martin *v.* Patrick (41 L.D. 284) ; overruled, 43 L.D. 536 (1914).
- Mason *v.* Cromwell (24 L.D. 248) ; vacated, 26 L.D. 368 (1898).
- Masten, E. C. (22 L.D. 337) ; overruled, 25 L.D. 111 (1897).
- Mather *v.* Hackley's Heirs (15 L.D. 487) ; vacated, 19 L.D. 48 (1894).
- Maughan, George W. (1 L.D. 25) ; overruled, 7 L.D. 94 (1888).
- Maxwell and Sangre de Cristo Land Grants (46 L.D. 301) ; modified, 48 L.D. 87, 88 (1921).
- McBride *v.* Secretary of the Interior (8 C.L.O. 10) ; modified, 52 L.D. 33 (1927).
- McCalla *v.* Acker (29 L.D. 203) ; vacated, 30 L.D. 277 (1900).
- McCord, W. E. (23 L.D. 137) ; overruled to extent of any possible inconsistency, 56 I.D. 73 (1937).
- McCornick, Williams S. (41 L.D. 661, 666) ; vacated, 43 L.D. 429 (1914).
- McCraney *v.* Heirs of Hayes (33 L.D. 21) ; overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).
- McDonald, Roy (34 L.D. 21) ; overruled, 37 L.D. 285 (1908).
- McDonogh School Fund (11 L.D. 378) ; overruled, 30 L.D. 616 (1901) (See 35 L.D. 399).
- McFadden *v.* Mountain View Mining & Milling Co. (26 L.D. 530) ; vacated, 27 L.D. 358 (1898).
- McGee, Edward D. (17 L.D. 285) ; overruled, 29 L.D. 166 (1899).
- McGrann, Owen (5 L.D. 10) ; overruled, 24 L.D. 502 (1897).

- McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148 (1909).
- McHarry v. Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340 (1938).
- McKernan v. Bailey (16 L.D. 368); overruled, 17 L.D. 494 (1893).
- McKittrick Oil Co. v. Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317 (1913)).
- McMicken, Herbert (10 L.D. 97); (11 L.D. 96), distinguished, 58 I.D. 257, 260 (1942).
- McNamara v. State of California (17 L.D. 296); overruled, 22 L.D. 666 (1896).
- McPeck v. Sullivan (25 L.D. 281); overruled, 36 L.D. 26 (1907).
- Mead, Robert E., 62 I.D. 111 (1955); overruled, Jones-O'Brien, Inc., 1 Sec 13, 85 I.D. 89 (1978).
- Mee v. Hughart (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487, 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 659, 660 (1923).
- Meeboer v. Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).
- Mercer v. Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649 (1907).
- Meyer v. Brown (15 L.D. 307) (See 39 L.D. 162, 225 (1910)).
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436 (1891).
- Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371 (1934).
- Mikesell, Henry D., A-24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 I.D. 149 (1963).
- Miller, D., 60 I.D. 161; overruled in part, 62 I.D. 210.
- Miller, Duncan, A-29760 (Sept. 18, 1963), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30742 (December 2, 1966), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30722 (April 14, 1967), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, 6 IBLA 283 (1972); overruled to extent inconsistent, Jones-O'Brien, Inc., 1 Sec 13, I.D. 89 (1978).
- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181 (1914).
- Miller v. Sebastian (19 L.D. 288); overruled, 26 L.D. 448 (1898).
- Milner & North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.
- Milton v. Lamb (22 L.D. 339); overruled, 25 L.D. 550 (1897).
- Milwaukee, Lake Shore & Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112 (1899).
- Miner v. Mariott (2 L.D. 709); modified, 28 L.D. 224 (1899).
- Minnesota & Ontario Bridge Co. (30 L.D. 77); no longer followed, 50 L.D. 359 (1924).
- Mitchell v. Brown (3 L.D. 65); overruled, 41 L.D. 396 (1912) (See 43 L.D. 520).
- Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495 (1897).
- Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348 (1935).
- Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 481-2 (1898).
- Morgan v. Craig (10 C.L.O. 234); overruled, 5 L.D. 303 (1886).
- Morgan, Henry S., 65 I.D. 369; overruled to extent inconsistent, 71 I.D. 22 (1964).
- Morgan v. Rowland (37 L.D. 90); overruled, 37 L.D. 618 (1909).
- Moritz v. Hinz (36 L.D. 450); vacated, 37 L.D. 382 (1909).
- Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319 (1908).
- Morrow v. State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101 (1904).
- Moses, Zelmer R. (36 L.D. 473); overruled, 44 L.D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551 (1908).
- Mountain Fuel Supply Co., A-31053 (Dec. 19, 1969); overruled, 79 I.D. 416 (1972).

- Mt. Whitney Military Reservation (40 L.D. 315 (1911)) (See 43 L.D. 33).
- Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163 (1921).
- Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360 (1910).
- Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532 (1915).
- Munsey, Glenn, Earnest Scott and Arnold Scott *v.* Smitty Baker Coal Co., Inc., 1 IBMA 144, 162 (Aug. 8, 1972), 79 I.D. 501, 509, distinguished, 80 I.D. 251 (1973).
- Myll, Clifton O., 71 I.D. 458 (1964); as supplemented, 71 I.D. 486 (1964), vacated, 72 I.D. 536 (1965).
- National Livestock Co. and Zack Cox, I.G.D. 55 (1938), is overruled, United States *v.* Maher, Charles, 5 IBLA 209, 79 I.D. 109 (1972).
- Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971); Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974) is distinguished by Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).
- Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358 (1899).
- Nebraska, State of *v.* Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123 (1898).
- Neilsen *v.* Central Pacific R.R. Co. (26 L.D. 252); modified, 30 L.D. 216 (1900).
- Newbanks *v.* Thompson (22 L.D. 490); overruled, 29 L.D. 108 (1899).
- Newton, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364 (1914).
- New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 97 (1921).
- New Mexico, State of (49 L.D. 314); overruled, 54 I.D. 159 (1933).
- Newton, Walter (22 L.D. 322); modified, 25 L.D. 188 (1897).
- New York Lode & Mill Site (5 L.D. 513); overruled, 27 L.D. 373 (1898).
- Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (1912) (See 42 L.D. 313).
- Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 234; overruled so far as in conflict, 29 L.D. 550 (1900).
- Northern Pacific R.R. Co. (21 L.D. 412, 23 L.D. 204; 25 L.D. 501); overruled, 53 I.D. 242 (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218 (1915); 117 U.S. 435).
- Northern Pacific R.R. Co. *v.* Bowman (7 L.D. 238); modified, 18 L.D. 224 (1894).
- Northern Pacific R.R. Co. *v.* Burns (6 L.D. 21); overruled, 20 L.D. 191 (1895).
- Northern Pacific R.R. Co. *v.* Loomis (21 L.D. 395); overruled, 27 L.D. 464 (1898).
- Northern Pacific R.R. Co. *v.* Marshall (17 L.D. 545); overruled, 28 L.D. 174 (1899).
- Northern Pacific R.R. Co. *v.* Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229 (1893).
- Northern Pacific R.R. Co. *v.* Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550 (1900).
- Northern Pacific R.R. Co. *v.* Symons (22 L.D. 686); overruled, 28 L.D. 95 (1899).
- Northern Pacific R.R. Co. *v.* Urquhart (8 L.D. 365); overruled, 28 L.D. 126 (1899).
- Northern Pacific R.R. Co. *v.* Walters (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391 (1922).
- Northern Pacific R.R. Co. *v.* Yantis (8 L.D. 58); overruled, 12 L.D. 127 (1891).
- Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196 (1925) (See 52 L.D. 58 (1927)).
- Nunez, Roman C. & Serapio (56 I.D. 363); overruled so far as in conflict, 57 I.D. 213.
- Nyman *v.* St. Paul, Minneapolis, & Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750 (1888).
- O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411 (1907).

- Oil and Gas Privilege and License Tax, Ft. Peck Reservation, Under Laws of Montana, M-36318 (Oct. 13, 1955); is *superseded* to the extent that it is *inconsistent* with Solicitor's Opinion—Tax Status of the Production of Oil and Gas From Lease of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).
- Olson v. Traver et al. (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382 (1900).
- Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342 (1908).
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333 (1949).
- Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331 (1943) (See 59 I.D. 346, 350).
- Opinion of Associate Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).
- Opinion of Associate Solicitor, M-36463, 64 I.D. 351 (1957); overruled, 74 I.D. 165 (1967).
- Opinion of Associate Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159 (1963).
- Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372 (1961).
- Opinion of Deputy Assistant Secretary (Dec. 2, 1966), affirming Oct. 27, 1966, is *superseded* to the extent that it is *inconsistent* with Solicitor's Opinion—Tax Status of the Production of Oil and Gas From Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).
- Opinion of Deputy Solicitor—M-36562 Aug. 21, 1959 (unpublished)—overruled by Solicitor's Opinion—M-36911, 86 I.D. 151 (1979)—Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska.
- Opinion of Secretary, 75 I.D. 147 (1968); vacated, 76 I.D. 69 (1969).
- Opinion of Solicitor, Oct. 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96 (1942).
- Opinion of Solicitor, Feb. 7, 1919 (D-44083); overruled, Nov. 4, 1921 (M-6397) (See 58 I.D. 158, 160 (1942)).
- Opinion of Solicitor, Aug. 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402 (1934).
- Opinion of Solicitor, June 15, 1934, (54 I.D. 517 (1934)); overruled in part, Feb. 11, 1957 (M-36410).
- Opinion of Solicitor, Oct. 25, 1934, 55 I.D. 14, overruled so far as inconsistent, 77 I.D. 49 (1970).
- Opinion of Solicitor—55 I.D. 466 (1936)—State of New Mexico, overruled to extent it applies to 1926 Executive Order to artificially developed water sources on public lands, by Solicitor's Opinion—M-36914, 86 I.D. 553 (1979)—Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and Bureau of Land Management.
- Opinion of Solicitor—M-28198, Jan. 8, 1936, finding, *inter alia*, that Indian title to certain lands within the Fort Yuma Reservation has been extinguished, is well founded and is affirmed by Solicitor's Opinion—M-36886, 84 I.D. 1 (1977)—Title to Certain Lands Within the Boundaries of the Ft. Yuma Indian Reservation as Established by the Executive Order of Jan. 9, 1885—but overruled by Solicitor's Opinion—M-36908, 86 I.D. 3 (1979)—Title to Certain Lands Within the Boundaries of the Fort Yuma (Now Called Quechan) Indian Reservation.
- Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567 (1943).
- Opinion of Solicitor, Aug. 31, 1943 (M-33183), distinguished, 58 I.D. 726, 729 (1944).

- Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.
- Opinion of Solicitor, M-34326, 59 I.D. 147 (1945); overruled in part, Solicitor's Opinion, M-36887, 84 I.D. 72 (1977).
- Opinion of Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).
- Opinion of Solicitor, Mar. 28, 1949 (M-35093); overruled in part, 64 I.D. 70 (1957).
- Opinion of the Solicitor, 60 I.D. 436 (1950); will not be followed to the extent that it conflicts with these views, 72 I.D. 92 (1965).
- Opinion of Solicitor, M-36051 (Dec. 7, 1950), modified; Solicitor's Opinion, M-36863, 79 I.D. 513 (1972).
- Opinion of Solicitor, M-36241 (Sept. 22, 1954), overruled as far as inconsistent with, Criminal Jurisdiction on Seminole Reservations in Fla., M-36907, 85 I.D. 433 (1978).
- Opinion of Solicitor, Jan. 19, 1956 (M-36378); overruled to extent inconsistent, 64 I.D. 57 (1957).
- Opinion of Solicitor, June 4, 1957 (M-36443); overruled in part, 65 I.D. 316 (1958).
- Opinion of Solicitor, July 9, 1957 (M-36442); withdrawn and superseded, 65 I.D. 386, 388 (1958).
- Opinion of Solicitor, Oct. 30, 1957, 64 I.D. 393 (M-36429); no longer followed, 67 I.D. 366 (1960).
- Opinion of Solicitor, 64 I.D. 351 (1957); overruled, M-36706, 74 I.D. 165 (1967).
- Opinion of Solicitor, 64 I.D. 435 (1957); will not be followed to the extent that it conflicts with these views, M-36456 (Supp.) (Feb. 18, 1969), 76 I.D. 14 (1969).
- Opinion of Solicitor, July 29, 1958 (M-36512); overruled to extent inconsistent, 70 I.D. 159 (1963).
- Opinion of Solicitor, Oct. 27, 1958 (M-36531); overruled, 69 I.D. 110 (1962).
- Opinion of Solicitor, July 20, 1959 (M-36531, Supp.); overruled, 69 I.D. 110 (1962).
- Opinion of Solicitor, 68 I.D. 433 (1961); distinguished and limited, 72 I.D. 245 (1965).
- Opinion of Solicitor, M-36767 (Nov. 1, 1967) (supplementing, M-36599), 69 I.D. 195 (1962).
- Opinion of Solicitor, M-36735 (Jan. 31, 1968), is reversed and withdrawn, Relocation of Flathead Irrigation Project's Kerr Substation and Switchyard, M-36735 (Supp.), 83 I.D. 346 (1976).
- Opinion of Solicitor—M-36779 (Nov. 17, 1969), Appeals of Freeport Sulphur Co. & Texas Gulf Sulphur Co., distinguished with respect to applicability of exemptions (4) & (9) of FOIA to present value estimates and overruled with respect to applicability of exemption (5) of FOIA to presale estimates, Solicitor's Opinion—M-36918, 86 I.D. 661 (1979).
- Opinion of Solicitor—M-36841 (Nov. 9, 1971), Appeal of Amoco Production Co., distinguished with respect to applicability of exemptions (4) & (9) of FOIA to the present value estimates and overruled with respect to applicability of exemption (5) of FOIA to presale estimates, Solicitor's Opinion—M-36918, 86 I.D. 661 (1979).
- Opinion of Solicitor—M-36886, 84 I.D. 1 (1977)—Title to Certain Lands Within Boundaries of Ft. Yuma Indian Reservation as Established by Exec. Order of Jan. 9, 1885 is overruled by Solicitor's Opinion—M-36908, 86 I.D. 3 (1979)—Title to Certain Lands Within the Boundaries of the Ft. Yuma (Now Called Quechan) Indian Reservation.
- Opinions of Solicitor, Sept. 15, 1914, and Feb. 2, 1915; overruled, Sept. 9, 1919 (D-43035, May Caramony) (See 58 I.D. 149, 154-156 (1942)).
- Oregon and California RR. Co. v. Puckett (39 I.D. 169); modified, 53 I.D. 264 (1931).

- Oregon Central Military Wagon Road Co. v. Hart (17 L.D. 480); overruled, 18 L.D. 543 (1894).
- Owens v. State of California (22 L.D. 369; overruled, 38 L.D. 253 (1909).
- Pace v. Carstarphen (50 L.D. 369); distinguished, 61 I.D. 459 (1954).
- Pacific Slope Lode (12 L.D. 686); overruled so far as in conflict, 25 L.D. 518 (1897).
- Page, Ralph, 8 IBLA 435 (Dec. 22, 1972), explained; Sam Rosetti, 15 IBLA 288, 81 I.D. 251 (1974).
- Papina v. Alderson (1 B.L.P. 91); modified, 5 L.D. 256 (1886).
- Patterson, Charles E. (3 L.D. 260); modified, 6 L.D. 284 & 624.
- Paul Jarvis, Inc., Appeal of (64 I.D. 285); distinguished, 64 I.D. 388 (1957).
- Paul Jones Lode (28 L.D. 120); modified, 31 L.D. 359 overruled, 57 I.D. 63 (1939).
- Paul v. Wiseman (21 L.D. 12); overruled, 27 L.D. 522 (1898).
- Pecos Irrigation and Improvement Co. (15 L.D. 470); overruled, 18 L.D. 168, 268 (1894).
- Pennock, Belle L. (42 L.D. 315); vacated, 43 L.D. 66 (1914).
- Perry v. Central Pacific R.R. Co. (39 L.D. 5); overruled so far as in conflict, 47 L.D. 303, 304 (1920).
- Phebus, Clayton (48 L.D. 128); overruled so far as in conflict, 50 L.D. 281; overruled to extent inconsistent, 70 I.D. 159 (1963).
- Phelps, W. L. (8 C.L.O. 139); overruled, 2 L.D. 854 (1884).
- Phillips, Alonzo (2 L.D. 321); overruled, 15 L.D. 424 (1892).
- Phillips v. Breazeale's Heirs (19 L.D. 573); overruled, 39 L.D. 93 (1910).
- Phillips, Cecil H., A-30851 (Nov. 16, 1967), overruled, 79 I.D. 416 (1972).
- Phillips, Vance W., 14 IBLA 79 (Dec. 11, 1973) is modified by Vance W. Phillips and Aelisa A. Burnham, 19 IBLA 211 (Mar. 21, 1975).
- Pieper, Agnes C. (35 L.D. 459); overruled, 43 L.D. 374 (1914).
- Pierce, Lewis W. (18 L.D. 328); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422 (1947).
- Pietkiewicz v. Richmond (29 L.D. 195); overruled, 37 L.D. 145 (1908).
- Pike's Peak Lode (10 L.D. 200); overruled in part, 20 L.D. 204, 48 L.D. 523 (1922).
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- Popple, James (12 L.D. 433); overruled, 13 L.D. 588 (1891).
- Powell, D. C. (6 L.D. 302); modified, 15 L.D. 477 (1892).
- Prange, Christ C. & William C. Braasch (48 L.D. 488); overruled so far as in conflict, 60 I.D. 417, 419 (1950).
- Premo, George (9 L.D. 70) (See 39 L.D. 162, 225 (1910)).
- Prescott, Henrietta P. (46 L.D. 486); overruled, 51 L.D. 287 (1925).
- Pringle, Wesley (13 L.D. 519); overruled, 29 L.D. 599 (1900).
- Provensal, Victor H. (30 L.D. 616); overruled, 35 L.D. 399 (1907).
- Prue, Widow of Emanuel (6 L.D. 436); vacated, 33 L.D. 409 (1905).
- Pugh, F. M. (14 L.D. 274); in effect vacated, 232 U.S. 452.
- Puyallup Allotment (20 L.D. 157); modified, 29 L.D. 628 (1900).
- Ramsey, George L., Heirs of Edwin C. Philbrick (A-16060), Aug. 6, 1931, unreported; recalled and vacated, 58 I.D. 272, 275, 290 (1942).
- Rancho Alisal (1 L.D. 173); overruled, 5 L.D. 320 (1866).
- Ranger Fuel Corp., 2 IBMA 163 (July 17, 1973), 80 I.D. 708; Set aside by Memorandum Opinion and Order Upon Reconsideration in Ranger Fuel Corp., 2 IBMA 186 (Sept. 5, 1973), 80 I.D. 604.
- Rankin, James D. (7 L.D. 411); overruled, 35 L.D. 32 (1906).
- Rankin, John M. (20 L.D. 272); reversed, 21 L.D. 404 (1895).

- Rayburn, Ethel Cowgill, A-28866 (Sept. 6, 1962) is modified by T. T. Cowgill, 19 IBLA 274 (Apr. 6, 1975).
- Rebel Lode (12 L.D. 683); overruled, 20 L.D. 204; 48 L.D. 523 (1922).
- Reed v. Buffington (7 L.D. 154); overruled, 8 L.D. 110 (1889) (See 9 L.D. 360).
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- Reid, Bettie H., Lucille H. Pipkin (61 I.D. 1); overruled, 61 I.D. 355 (1954).
- Reliable Coal Corp., 1 IBMA 50, 78 I.D. 199 (1971) distinguished, Zeigler Coal Corp., 1 IBMA 71, 78 I.D. 362 (1971).
- Relocation of Flathead Irrigation Project's Kerr Substation and Switchyard, M-36735 (Jan. 31, 1968); is reversed and withdrawn, M-36735 (Supp.), 83 I.D. 346 (1976).
- Rialto No. 2 Placer Mining Claim (34 L.D. 44); overruled, 37 L.D. 250 (1908).
- Rico Town Site (1 L.D. 556); modified, 5 L.D. 256 (1886).
- Rio Verde Canal Co. (26 L.D. 381); vacated, 27 L.D. 421 (1898).
- Roberts v. Oregon Central Military Road Co. (19 L.D. 591); overruled, 31 L.D. 174 (1901).
- Robinson, Stella G. (12 L.D. 443); overruled, 13 L.D. 1 (1891).
- Rogers v. Atlantic & Pacific R.R. Co. (6 L.D. 565); overruled so far as in conflict, 8 L.D. 165 (1889).
- Rogers, Fred B. (47 L.D. 325); vacated, 53 I.D. 649 (1932).
- Rogers, Horace B. (10 L.D. 29); overruled, 14 L.D. 321 (1892).
- Rogers v. Lukens (6 L.D. 111); overruled, 8 L.D. 110 (1889) (See 9 L.D. 360).
- Romero v. Widow of Knox (48 L.D. 32); overruled so far as in conflict, 49 L.D. 244 (1922).
- Roth, Gottlieb (50 L.D. 196); modified, 50 L.D. 197 (1924).
- Rough Rider and Other Lode Claims (41 L.D. 242, 255); vacated, 42 L.D. 584 (1913).
- St. Clair, Frank (52 L.D. 597); modified, 53 I.D. 194 (1930).
- St. Paul, Minneapolis & Manitoba Ry. Co. (8 L.D. 255); modified, 13 L.D. 354 (1891) (See 32 L.D. 21).
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- Schweitzer v. Hilliard (19 L.D. 294); overruled so far as in conflict, 26 L.D. 639 (1898).
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- Shale Oil Co., overruled so far as in conflict, (See 55 I.D. 287 (1935)).
- Shanley v. Moran (1 L.D. 162); overruled, 15 L.D. 424 (1892).
- Shillander, H. E., A-30279 (Jan. 26, 1965), overruled, 79 I.D. 416 (1972).
- Shineberger, Joseph (8 L.D. 231); overruled, 9 L.D. 202 (1889).
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- Simpson, Lawrence W. (35 L.D. 399, 609); modified, 36 L.D. 205 (1907).
- Simpson, Robert E., A-4167 (June 22, 1970); overruled to extent inconsistent, *United States v. Union Carbide Corp.*, 31 IBLA 72, 84 I.D. 309 (1977).
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- State of California (22 L.D. 428); overruled, 32 L.D. 34 (1903).
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NOTE.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2. "C.L.L." to Copp's Public Land Laws edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes. "C.L.O." to Copp's Land Owner, vols. 1-18. "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52. "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—EDITOR.

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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

**ESTATE OF GLADYS MARIE BELL-
MARD (RANDALL, PRESTON,
HARRIS) WILSON***

7 IBIA 111

Decided *December 29, 1978*

Appeal from an administrative law
judge's order dismissing probate.

Affirmed and dismissed.

1. Indian Probate: Secretary's Author- ity: Generally

Proceedings for the determination of a
deceased Indian's heirs in a case over
which the Department had no jurisdic-
tion must be dismissed.

APPEARANCES: Evelyn Allen,
appellant, *pro se*.

**OPINION BY CHIEF ADMIN-
ISTRATIVE JUDGE WILSON**

**INTERIOR BOARD OF IN-
DIAN APPEALS**

Evelyn Allen, hereinafter referred
to as appellant, has appealed Ad-
ministrative Law Judge Sam E.
Taylor's order of Oct. 6, 1978, dis-

missing probate proceedings in-
volving the above-captioned estate.

Gladys Marie Bellmard (Ran-
dall, Preston, Harris) Wilson, here-
inafter referred to as the decedent,
died Sept. 22, 1976, at the age of 73.

A hearing was duly held and con-
cluded at Pawnee, Okla., on May 19,
1977. Thereafter, on Jan. 27, 1978,
Judge Taylor issued an order disap-
proving will, determining heirs and
decreeing distribution.

Thereafter, by letter dated Mar.
6, 1978, the Acting Superintendent,
Pawnee Agency, Okla., submitted
the original last will and testament
of the decedent dated May 1, 1972,
which the agency had overlooked in
the preparation of the probate file
used in the hearing of May 19, 1977.
The letter was accepted as a petition
for a rehearing by Judge Taylor.
Thereafter, the matter was sched-
uled for rehearing at the Pawnee
Agency on May 15, 1978, with all
interested parties, including appel-
lant, being advised thereof.

At the rehearing, with appellant
and Theodore Roosevelt Bellmard
present, the judge advised them that
on May 1, 1978, he had received a

*Not in Chronological Order. This is a 1978
decision.

memorandum from Acting Rights Protection Officer David E. Harrison, Bureau of Indian Affairs, Washington, D.C., indicating that all of the decedent's property was unrestricted, the restrictions having been removed on Apr. 7, 1950, by the Department at decedent's request. The judge further advised the parties that he would subsequently issue a dismissal order regarding the proceedings.

From the evidence adduced at the rehearing the judge on Oct. 6, 1978, among other things, revoked and canceled the order disapproving will, determining heirs and decreeing distribution dated Jan. 27, 1978, and dismissed the proceedings for lack of jurisdiction. It is from the foregoing order that the appellant has appealed. In support of her appeal the appellant alleges that decedent was never notified of the removal of restrictions on the property in question; that the Bureau of Indian Affairs failed to carry out the Indian-United States Government Trust Responsibility and that the decedent had always considered the property as restricted and tax exempt. Moreover, the appellant, because of the BIA's alleged negligence in failing to advise the decedent of the removal of restrictions, urges the Office of Hearings and Appeals to handle the probate of the decedent's estate.

including certified Bureau of In-

An examination of the record, dian Affairs' documents regarding the removal of restrictions on the

decedent's property, clearly supports the judge's order dismissing probate.

In view of the actual removal of restrictions by the Department at the decedent's request or application, the allegations given in support of appellant's appeal are to no avail.

[1] Proceedings for the determination of a deceased Indian's heirs in a case over which the Department had no jurisdiction must be dismissed. *Estate of Oh-ste-wat-tah*, IA-34 (Nov. 7, 1950).

Clearly, the decedent's unrestricted estate falls within the probate jurisdiction of the proper State or Tribal court and not with the Department. Accordingly, the administrative law judge's order of Oct. 6, 1978, should be affirmed and the appeal herein dismissed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order dismissing probate dated Oct. 6, 1978, issued by Administrative Law Judge Sam E. Taylor is hereby affirmed and the appeal herein is dismissed.

This decision is final for the Department.

ALEXANDER H. WILSON,
Chief Administrative Judge.

I CONCUR:

WM. PHILIP HORTON,
Administrative Judge.

January 2, 1979

**TITLE TO CERTAIN LANDS WITH-
IN THE BOUNDARIES OF THE FORT
YUMA (NOW CALLED QUECHAN)
INDIAN RESERVATION**

M-36908

January 2, 1979

**1. Indian Lands: Ceded Lands—
Statutory Construction: Generally**

When interpreting Federal agreements and statutes pertaining to Indian Affairs, one must consider the legislative history, as well as surrounding circumstances and subsequent administrative practices to determine what the parties intended, and in particular, what the Indians understood the agreement to mean. Doubtful expressions are to be resolved in the Indians' favor.

**2. Indian Lands: Ceded Lands—
Statutory Construction: Generally**

Congressional intent to modify or abrogate Indian property rights must be clear and cannot be lightly inferred.

**3. Act of Aug. 15, 1894—Indian
Lands: Ceded Lands**

The Agreement of Dec. 4, 1893, between the Yuma (now Quechan) Indians and the United States, ratified in the Act of Aug. 15, 1894 (28 Stat. 286, 332) provided for a conditional cession of the nonirrigable land of the Fort Yuma Reservation. The conditions which included allotment and sale of surplus irrigable land and the opening of nonirrigable lands to settlement and entry, did not occur during the decade following the agreement and ratifying statute.

**4. Act of Apr. 21, 1904—Indian
Lands: Irrigation—Statutory Con-
struction: Generally**

Sec. 25 of the Act of April 21, 1904 (33 Stat. 189, 244), which authorized the application of the 1902 Reclamation Act to the Fort Yuma and Colorado River Reservations, and which provided for the allotment and sale of surplus irrigable lands on those reservations, was unrelated to and was not intended to effect the conditional cession provided for in the 1893 agreement and the 1894 ratifying statute.

This opinion overrules two previous Solicitor's Opinions on the same subject: M-28198 (Jan. 8, 1936), finding, inter alia, that the Indian title to certain lands within the Fort Yuma Indian Reservation has been extinguished; and M-36886, 84 I.D. 1 (1977), Title to Certain Land Within the Boundaries of the Fort Yuma Indian Reservation as Established by the Executive Order of Jan. 9, 1884.

**OPINION BY
OFFICE OF THE SOLICITOR**

December 20, 1978

TO: SECRETARY

FROM: SOLICITOR

SUBJECT: TITLE TO CERTAIN LANDS
WITHIN THE BOUNDARIES OF
THE FORT YUMA (NOW CALLED
QUECHAN) INDIAN RESERVA-
TION

The Quechan Indian Tribe, the Bureau of Indian Affairs,¹ and the

¹ Memo of Nov. 15, 1977, from Acting Assistant Secretary for Indian Affairs to Associate Solicitor for Indian Affairs.

Chairman of the Senate Committee on Interior and Insular Affairs,² have requested this Department to reconsider the legal question of whether the Quechan Tribe retains ownership of approximately 25,000 acres of nonirrigable land within the boundaries of their 1884 Executive Order Reservation. This question has been considered on two previous occasions by the Solicitor, resulting in the issuance of opinions in 1936 (M-28198), and 1977 (M-36886, 84 I.D. 1), which have concluded that title to this land was unconditionally ceded to the United States by virtue of a negotiated 1893 cession agreement and an 1894 statute, ratifying such agreement. (28 Stat. 286, 332).

Prior to the issuance of the 1977 Solicitor's Opinion, a draft Solicitor's Opinion to the opposite effect was widely circulated. That Opinion concluded that the 1893 agreement and 1894 ratifying statute provided for a conditional cession of the nonirrigable lands, that the conditions were not fulfilled, and that the cession of the nonirrigable lands had therefore not been effected. Department files on this subject reveal that the draft opinion was seriously considered, and that extensive preparations were made for the issuance of a decision in favor of the tribe. The February 1976 decision by the Solicitor upholding the 1936 opinion was an unexpected event. The Senate Subcommittee on Indian Affairs held

hearings in May and June of 1976, to air the controversy and learn the legal basis of the 1976 decision by the Solicitor. In those hearings, the Secretary agreed to direct the Solicitor to prepare a written legal opinion supporting the 1976 decision. A written opinion, M-36886, was published on Jan. 17, 1977.

The sharp and continuing divergence in legal views with respect to this issue have persuaded me that the matter merits reconsideration. Accordingly, I directed review of the Department's files and all previously prepared legal opinions to provide an independent evaluation of the Quechan claim to the 25,000 nonirrigable acres.

Having reviewed that evaluation, I conclude that the 1893 agreement and 1894 ratifying statute provided for a *conditional* cession of the nonirrigable acreage. The conditions articulated in the agreement, which included the allotment and irrigation of irrigable land to the Indians, the sale of surplus to settlers under strictly prescribed conditions, the construction of an irrigation canal, and the opening of nonirrigable lands to settlement, were not met by the United States. No lump sum, or other form of compensation, was provided for the land cession. Allotment and irrigation did not occur on the reservation until Congress passed a 1904 statute (33 Stat. 189) which applied the Reclamation Act to the Ft. Yuma and Colorado River Reservation. The 1904 Act appears to be totally unrelated to the 1893 cession agreement, ex-

² Letter of Feb. 8, 1977, from Senator Henry Jackson to Honorable Cecil Andrus, Secretary of the Dept. of the Interior.

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cept for mention of it in the legislative history as part of the explanation of the continuing lack of irrigation on the reservation. In short, the conditional cession in 1893 was never effected and the title to the nonirrigable acreage, therefore, remains in the Tribe.

The records of this Department reveals that the nonirrigable lands were administered as tribal lands until the 1936 opinion of Solicitor Margold. *See* footnotes 8 and 9, *infra*, detailing the numerous occasions on which actions were taken by the Department during that period on the basis that these were Indian lands.

In the more than forty years since this Department first ruled that the land in question did not belong to the Quechan Tribe, third parties have acquired various interests such as easements or rights of way. Some of these interests existed prior to the establishment of the reservation, some were granted by Congress and still others were granted by Bureaus in this Department. My recognition of title in the Quechan Indians is subject to these valid third party interests. The Quechan Indian Tribe has previously recognized that their title will be subject to each of these third party interests and also to lands taken by the United States for reclamation purposes.

Background Facts

The Fort Yuma Reservation was created by executive order on Jan.

9, 1884. (1 Kappler, Indian Affairs—Laws and Treaties 832.) In 1893, the Quechan Indians sent a petition to the President and to Congress in which they indicated a willingness to cede their rights in their reservation in return for receiving allotments of irrigated land. (S. Exec. Doc. No. 68, 53rd Cong. 2d Sess. 14-16 (1894)). The Indians expressed belief that they would improve economically if they had smaller, individual units of irrigated land, suitable for farming. In 1893, an agreement was negotiated providing for the allotment of irrigable lands; the sale of surplus irrigable lands under strictly prescribed conditions, the holding of sale proceeds in trust for the tribe and the opening of nonirrigable acres to settlement under the general land laws of the United States. There was no other provision for a lump sum payment or for any identifiable consideration. The agreement was ratified by Congress in 1894 (28 Stat. 286, 332). The ratifying act further provided that construction of an irrigation canal (the right-of-way for which had been granted in an 1893 statute) would have to be commenced within 3 years of the date of passage of the act or the right-of-way would be forfeited. In addition, each adult male was to receive free water for 1 acre of his allotment over a 10-year period.

During the following decade, allotment did not occur, the President did not proclaim the nonirrigable

lands a part of the public domain and open to settlement, and the irrigation canal was not built. Then, on June 17, 1902, Congress passed the Reclamation Act (32 Stat. 388). In 1904, mindful of the continuing and unsatisfied need for irrigation on both the Fort Yuma and Colorado River Reservations, Congress passed an Indian Appropriations Act which extended the benefits of the 1902 Reclamation Act to those two reservations, and which provided for the allotment of irrigable land to tribal members and for the sale of surplus irrigable lands to non-Indians (Act of Apr. 21, 1904, 33 Stat. 189, 224). The terms under the 1904 Act for the sale of surplus lands and for holding of proceeds differed significantly from those in 1893 agreement and 1894 ratifying act. The 1904 Act was amended in 1911 to increase the allotments to 10 acres. (36 Stat. 1059, 1063.) Allotment of irrigable lands was completed by 1912. The irrigable lands were fully disposed of by 1949. The 25,000 nonirrigable acres were not returned to the public domain, opened to settlement and disposed of. They are the subject of this opinion. While the majority of these lands continue to be nonirrigable, it is estimated that between 5,000 and 5,500 acres, the bulk of which are in California, are "practically" irrigable.

Legal Analysis—1893 Agreement and 1894 Statute

The resolution of the title question turns, I believe, on the correct interpretation of the 1893 agree-

ment and the ratifying statute. Case law establishes that when interpreting Federal agreements and statutes pertaining to Indian Affairs, one must consider the legislative history, as well as surrounding circumstances and subsequent administrative practices, to determine what the parties intended, and in particular, what the Indians understood the agreement to mean. In so doing, doubtful expressions are to be resolved in the Indians' favor.³ Clearly, such interpretative approach is appropriate in a case such as this where the trustee is examining and interpreting a transaction involving valuable assets of its ward, and in which the trustee is the other party to the transaction, who stands to gain from the disposition of the assets other than to the tribe. As stated in the case of *Navajo Tribe of Indians v. United States*, 364 F. 2d 320, 322, 323 (Ct. Cl. 1966):

Since the Department of the Interior had an obligation to safeguard the property of the Navajos when they were dealing with third parties, it is clear that an even greater duty existed when the Department itself entered into transactions with the Indians. * * * Because of

³ *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941); *Antoine v. Washington*, 420 U.S. 194 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The conclusions of this opinion flow from premises which differ from those in the 1936 and 1977 opinions in two fundamental respects: (a) a finding that the documents, rather than being clear, contain ambiguities in critical areas; and (b) canons of construction applied here are those which are uniquely applicable to controversies involving Indian rights as opposed to those which may apply to controversies generally.

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this and because of the Government's special duty toward the Indians, the various dealings must be carefully scrutinized.

* * *

Neither the agreement nor the ratifying statute is sufficiently clear with regards to the cession of the nonirrigable lands to compel one interpretation over another. The actual language of the cession Article is:

Article I. The said Yuma Indians, *upon the conditions hereinafter expressed*, do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following described tract of country in San Diego, California, established by executive order of January 9, 1884, which describes its boundaries as follows * * * .
(Italics added.)

The remaining articles of the agreement provide for the allotment of irrigable lands to Indians, the sale of surplus irrigable lands to settlers, the manner in which such sale was to be conducted and proceeds thereof handled, the issuing of trust patents and the opening of lands, not subject to irrigation, to settlement.

In Article I, there is an apparent conflict of meaning, with regard to timing of the cession, between the phrase, "*upon the conditions hereinafter expressed*" and the phrase, "do *hereby* surrender and relinquish." Also, the remainder of the agreement does not list conditions or governmental duties, describing them as such; this makes it difficult to discern from the face of the doc-

ument, which of the Articles contain conditions or compensation which might affect the relinquishment. Article VI, the only article specifically relating to the nonirrigable lands, merely provides for the future opening of such lands to settlement—suggesting a cession in trust, *i.e.*, a cession solely for purposes of permitting the United States to act as broker with respect to those lands. *See Ash Sheep Co. v. United States*, 252 U.S. 159 (1920). The corresponding provision in the ratifying statute provides that the nonirrigable lands *shall* become a part of the public domain, and *shall* be opened to settlement by *Presidential proclamation*. The language is in the *future tense* and requires executive action. Lastly, while the Article providing for the sale of irrigable lands provides for holding proceeds for the tribe, there is no corresponding arrangement expressed regarding the sale of nonirrigable lands. This raises the question of whether the same arrangement was intended, or understood, for the nonirrigable lands.

Under these circumstances the language is not clear and unambiguous on its face. It is not clear to me, from the cited language, that the Indians immediately ceded title to all their reservation lands, for no money whatsoever, and without actual performance of certain acts by the U.S. Government.

Because the language of the agreement and statute is not clear,

it is necessary to resort to rules of interpretation. I am aware of the general principles of contract law which favor the construction of provisions of contracts as promises rather than conditions, 3A. A. Corbin, *Contracts*, § 635 (rev. ed. 1960); 5 S. Williston, *A Treatise on the Law of Contracts*, § 665 (W.H.E. Jaeger ed. 1961), and the general principles of real estate law which favor covenants over conditions. See 2 R. Powell, *The Law of Real Property*, §§ 187, 188 (1974); cf. 1 *American Law of Property*, § 2.8 (1952); 5 *id.* § 21.3 (a). Technical rules of conveyance should not be applied in the construction of agreements between the Indians and the Government. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). Rather, as noted above, the focal point of such construction is the intent of the parties. Thus, when construing another cession agreement containing conditional language, the Supreme Court examined legislative history, contemporary statements by tribal members, actual benefits delivered to the tribe (*i.e.*, lump sum payment) and subsequent treatment of the lands. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In finding that an immediate cession was effected, in spite of seemingly conditional language, the Supreme Court relied heavily on the facts that a sum certain was paid for the lands and that there was no evidence that the lands were subsequently administered as Indian lands. (*DeCoteau*, *supra* at 448).

Furthermore, the Court examined numerous contemporaneous accounts of the cession, which showed that at least some Indians believed they had sold their land.

The background information in this case is quite different from that in *DeCoteau*. The legislative history indicates that the main purpose of the Agreement—from the standpoint of the Indians who signed it,⁴ and the Congress that ratified it⁵—was to provide irrigation to the reservation. Indeed, in the 1894 statute, Congress added statutory provisions concerning the construction of a canal requiring that it be commenced within 3 years or the right of way previously granted would be forfeited. The Indians perceived

⁴In a post-Agreement letter from the Indians to the President and Congress, the Tribe explained why they were willing to cede their lands:

"We believe if furnished with a small tract of land, *with water to irrigate it* and with the means of cultivating, we could improve our fortunes to the extent of securing at least all the necessities of life. We believe if the land now embraced in our reservation could be thrown open to settlement an irrigating ditch would be built through the reservation. * * * *While with water the soil is fertile, nothing will grow without irrigation*, for there is no rain. Hence we want the ditch built so that we can get water and have early and large crops like our white friends. We are willing to give up a large part of our reservation because as it is it is worthless to us, *if we can have small tracts set apart for our use.*"

(Italics added).

53rd Congress, 2d Session, Senate Ex. Doc. 68 at 14-15.

⁵The paramount reason for the proposed Agreement is found in the proposition of the Colorado River Irrigating Co. to furnish the Yuma Indians with water for irrigation purposes. 53rd Congress, 2d Session, House Report No. 1145, at 2. See also Senate Ex. Doc. 68, *supra*. Later legislative history affirms this view of the 1894 Act. 58th Congress, 2d Session, Senate Report 1660.

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farming irrigated allotments as the key to achieving their goal of economic improvement and they offered to cede their reservation in return for irrigated allotments, perhaps believing they had to do so to entice Government action (since the negotiation of cession-allotment agreements was a prevailing practice at that time). There is no evidence that obtaining money as the desired compensation was considered by the Indians.

Evidence of either the Government's or the tribe's intent regarding the nonirrigable lands is inconclusive. There is nothing to suggest that the Government wanted to acquire the nonirrigable lands. In the negotiated agreement, the Government did not specify any compensation for the nonirrigable lands, whereas it did clearly provide compensation for any irrigable lands that would be removed from Indian ownership. This is a particularly troublesome point because the cession agreement was negotiated pursuant to the General Allotment Act which authorized the Government to negotiate for the cession of surplus Indian lands, *upon just and equitable* terms. (Act of Feb. 8, 1887, 24 Stat. 389, § 5, 25 U.S.C. § 348 (1976)). This failure of compensation for the nonirrigable lands seems a crucial "oversight" of the agreement.

To be sure, Congress could have simply taken the nonirrigable lands under Article VI of the Agreement

with no compensation.⁶ However, evidence of such intent is not obvious. First, the Government had proceeded by agreement with the Indians. Secondly, the Agreement and statute were intended to implement the General Allotment Act, which authorized the Secretary to negotiate with Indians for the cession of their lands only under such terms as were "just and equitable." Congress and the Department, it seems, were acting more in their guardianship capacity,⁷ and not in a confiscatory manner.

There is, moreover, nothing in the history of that time indicating that the Government had any particular interest in acquiring the lands in question. By contrast, in the case of the cession agreement construed in the *DeCoteau* case, *supra*, there was evidence of strong pressure by non-Indian settlers on the Government to acquire particular Indian lands so that the settlers could move in. Not only is evidence of such pressure totally lacking in this case, but the Government's failure to ever open the land to settlement strength-

⁶ The courts have held that Congress (or the executive, for that matter) could constitutionally take the land of an executive order reservation even without providing the tribe any compensation. *Stout Tribe v. United States*, 316 U.S. 317 (1942); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103-104 (1949). The result of these cases, however, was not clearly anticipated in 1904. *Of*, 34 Op. A.G. 181 (1924); William F. Tucker, 13 L.D. 628 (1891); C. N. Cotton, 12 L.D. 205 (1890).

⁷ *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935); *Lane v. Pueblo of Santa Rosa*, 249, U.S. 110, 113 (1919); *United States v. Lynah*, 188 U.S. 445, 462 (1903).

ens the impression that no one was very interested in, much less had specific designs on, the land.

There is a similar lack of evidence as to how the Indians understood the agreement to affect the status of the nonirrigable lands. It must be remembered that Article VI of the agreement did not refer to the cession or sale of nonirrigable lands, nor did it state they were returned to the public domain. It merely stated they would be opened to settlement. One might assume that because the Indians expressed interest in farming irrigated land, that the Indians were as disinterested in the nonirrigable land as was the Government. But, whether the Indians understood that they had casually given away such land, without any apparent compensation, and without retaining any interest therein, is a further assumption for which there is simply no evidence and, therefore, which we are not justified in making. Belief that non-Indian settlement on such lands to be a benefit to the Indians and, therefore, a condition of, or compensation for the cession of such lands, in strict technical sense, a possible theory supporting an immediate cession. However, it is not clear that these Indians—who were not versed in either the English language or such a sophisticated concept—understood that they would be giving up valuable real estate in exchange for the “privilege” of having non-Indian settlers as neighbors on their reservations.

In addition to the lack of payment, and the lack of evidence that

the parties intended the transfer of the nonirrigable lands, this case differs sharply from that in *DeCoteau* and in *Rosebud Sioux Tribe, supra*, in that the Department of Indian Affairs continued to administer the nonirrigable lands in trust for the tribe in the granting of leases and permits and in holding rents in trust for the tribe.

The results of an intensive file review, conducted in 1975 by staff of the Solicitor's Office and detailed below, show a clear and basically consistent history of administration of the nonirrigable lands by the Bureau of Indian Affairs prior to the 1936 Solicitor's Opinion. This administrative history was acknowledged in the 1936 Opinion. Maps of the area issued between 1894 and 1936 include the Fort Yuma Indian Reservation and depict its boundaries as declared in the 1884 Executive Order.⁸ The

⁸ *E.g.*, U.S.G.S. map, “Colorado River from Black Canyon, Ariz.-Nev. to Arizona-Sonora Boundary,” surveyed in 1902 and 1903 (Exhibit RO-13, *Quechan Tribe v. United States*, Indian Claims Commission Docket No. 320 [hereinafter cited as Claims Exhibit—]); U.S.G.S. map “Yuma Quadrangle, California-Arizona,” ed. of Apr. 1905 (BIA Files, Phoenix); 1936 reprint of Apr. 1905 U.S.G.S. map (Claims Exhibit RO-13); U.S. Reclamation Service maps of the Yuma Project in its annual reports to Congress (*e.g.*, Third Annual Report: 1903-04, at 192-193 (2d ed. 1905); Fifth annual Report: 1906, at 100-01 (1907)); U.S. Reclamation Service Map No. 16774 (Jan. 1916) (Yuma Project File 154-D, A610158; File 154, “Lands-General,” A609223); U.S. Reclamation Service Map No. 17471 (1917) (Yuma Project File 154, “Lands-General,” A609224, 2-328). The latter two maps, which were produced after issuance of the Indian trust allotment patents on Feb. 5, 1914, show the Indian Allotments (or Indian Unit) and continue to depict the entire area encompassed by the 1884 Executive Order as the Yuma Indian Reservation. The field notes, reports and official plat of survey prepared by General Land Office Surveyor

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Bureau of Land Management's plat records, as well as the original documents signed at the Secretarial level, show that all rights of way issued by the Department across the nonirrigable lands (except those which may have been issued by the Bureau of Reclamation within its own rights of way) were issued under statutory authority pertaining to Indian reservations.⁹

F.N. 8—Continued

John L. Warboys between 1931 and 1934, as well as the underlying assignment instructions (Special Instructions Group 264, Calif.) repeatedly refer to, affirm and adopt the "West Boundary of the Yuma Indian Reservation" as described in the 1884 Executive Order and fixed by the Ingalls survey in 1895; and General Land Office Special Instructions Group 281, relating to T. 16 S., R. 23 E., S.B.M., dated Apr. 15, 1932, refers to "that portion of the Yuma Indian Reservation lying between the Reclamation Levee and the abandoned channel of the Colorado River" (Claims Exhibit RO-13, and supporting documents). Additional maps, recognizing the continued existence of the reservation as described in the 1884 Executive Order are listed in note 9 *infra*.

"Map of the Definite Location of the Southern Pacific Railroad in the Yuma Indian Reservation, Calif.," G.L.O. no. 506131-1915, surveyed Dec. 1906, submitted to the Indian Agent, Yuma Indian Reservation, Mar. 13, 1907, and approved by Acting Secretary of the Interior George W. Woodruff on June 18, 1907, subject to the provisions of the Act of Mar. 2, 1899 (30 Stat. 990, *as amended*, 25 U.S.C. §§ 312-18 (1976)) (BIA Files, Phoenix) (the BLM plat records for sec. 36, T. 16 S., R. 22 E., Record issuance of another right-of-way to the railroad under the 1899 Act, with jurisdiction in the BIA on July 29, 1926 (R. 1359; S 3492)); "Map of the Definite Location of the Inter Calif. Ry. in Yuma Indian Reservation, Calif.," received by Superintendent Egan, Yuma Indian Reservation, Sept. 30, 1909, and approved by the Department Feb. 10, 1910, under the Act of Mar. 2, 1899, with the schedule of compensation to the Indians required by that act being approved by First Assistant Secretary Frank Pierce on May 14, 1910, pursuant to the recommendation of Superintendent Egan and Commissioner of Indian Affairs Valentine (BIA Files, Phoenix); "Proposed Telephone and Telegraph Line Crossing the Yuma Indian Reservation,"

The Commissioner of Indian Affairs issued trader's licenses to occupy and use nonirrigable land on the reservation, near the western boundary until the issuance of the

Pacific Telephone and Telegraph Co., Right of Way Map LA 011977, approved by First Assistant Secretary of the Interior A. A. Jones on July 3, 1913, pursuant to the Act of Mar. 4, 1911 (36 Stat. 1253, *as amended*, 43 U.S.C. § 961 (1970)), with the requisite finding for Indian reservation lands of compatibility with the public interest being made by the First Assistant Secretary by notation on the July 2, 1913, memorandum from the Second Assistant Commissioner of Indian Affairs to the Secretary recommending approval, and with rental, payable to the account of the Quechan Tribe, being set at \$8.66 for the first year (Claims Exhibit RO-3) (related documents show the rental fee was collected on behalf of the Tribe for the full 50 year term of the right of way); "Center Line Location Map of Proposed High-Line Canal from Laguna Dam to Imperial Valley and Location of Power Plant," dated June, 1915, showing the reservation boundaries as established in 1884, submitted for the approval of the Secretary of the Interior pursuant to secs. 18-21 of the Act of Mar. 3, 1891 (26 Stat. 1095, 1101-02, *as amended*, 43 U.S.C. §§ 946-49 (1970)), sec. 2 of the Act of May 11, 1898 (30 Stat. 404, *as amended*, 43 U.S.C. § 951), and the Act of Feb. 15, 1901 (31 Stat. 790, *as amended*, 43 U.S.C. § 959 (1970)), all of which authorize rights of way through Indian reservations as well as public lands (BIA Files, Phoenix—no indication as to whether the right of way was approved); Memorandum dated June 6, 1917, from Assistant Commissioner of Indian Affairs Meritt to Commissioner Tallman of the General Land Office, responding to the latter's request for a report on the application of the Coachella Valley Ice and Electric Co. for a right of way for an electrical transmission line across Yuma Indian lands (all in the nonirrigable western portion of the 1884 reservation), advising that "the proposed right of way involves no Indian allotments but crosses a portion of the Yuma Indian Reservation which is absolutely waste desert land and upon which no Indians reside," and recommending approval of the application with an annual charge of \$5 per mile as compensation for damage to the Yuma Indian Reservation lands involved (BIA Files, Phoenix); "Proposed State Highway Through Yuma Indian Reservation," Calif. Highway Commission, dated July 16, 1923, *as amended* by maps of changes "A" through "D", dated Sept. 28, 1923, through May 1924, approved

(Continued)

1936 Solicitor's Opinion.¹⁰ Sand and gravel leases were issued by the Bureau of Indian Affairs on tribal unallotted lands within the Yuma Indian Reservation from at least 1929 to 1936 pursuant to sec. 26 of the Act of June 30, 1919 (41 Stat. 3, 31, *as amended*, 25 U.S.C. § 399

F.N. 9—Continued

by Assistant Secretary of the Interior John H. Edwards on Oct. 10, 1927, subject to the provisions of the Act of Mar. 3, 1901 (31 Stat. 1058, 1084, 25 U.S.C. § 311 (1976)), and amending the right of way as originally approved under the same act on Nov. 9, 1917 (Claims Exhibit RO-8; BLM Plat Records, Sacramento): Order of withdrawal and reservation of a right of way for a proposed Reclamation Service "power canal from siphon drop to Araz" across the Yuma Indian Reservation, withdrawing and reserving 236.05 acres of reservation land, of which approximately 3.5 acres were allotted lands, recommended by Director and Chief Engineer Davis of the U.S. Reclamation Service on Apr. 15, 1918, concurred in by Assistant Commissioner of Indian Affairs Meritt on the "understanding that adequate compensation be assessed and paid for damage to Indian lands involved," concurred in by Commissioner Tallman of the General Land Office, and approved on June 17, 1918, by Assistant Secretary of the Interior S. G. Hopkins under secs. 13 and 14 of the Act of June 25, 1910 (36 Stat. 855, 858, 43 U.S.C. § 148 (1970), 25 U.S.C. § 352 (1976)) (Yuma Project File 150, "Purchase of Lands—General, 1909 thru June 1919," A606156, A606163, A606167-68); "Southern Pacific Railroad Station Grounds" map received by the Superintendent of the Yuma Indian Reservation June 30, 1928, and approved by the Department on Dec. 18, 1928, pursuant to the Act of Mar. 2, 1899, *supra* (Claims Exhibit RO-11; BLM Plat Records, Sacramento). The Bureau of Land Management plat records in Sacramento, Calif., show three additional rights of way issued under statutes governing Indian reservation lands and noted as being under the jurisdiction of the Bureau of Indian Affairs: a highway right of way, R 2704, issued Oct. 24, 1930, under the Act of Mar. 3, 1901, *supra*, a telephone and telegraph line right of way, S 3489, issued June 14, 1927, under the Act of Mar. 3, 1901, *supra*, and a transmission and telephone right of way, LA 040525, issued Mar. 23, 1927, under the Act of Feb. 15, 1901, *supra*.

¹⁰ Trader's License covering 80 acres in the N/2 of the NW/2, sec. 25, T. 16 S., R. 21 E., S.B.M., issued to Robert M. Goebel Jan. 1, 1928, to James H. Maxey Aug. 6, 1929, and thereafter to Maxey and later his widow, Mary A. Maxey, through various renewals (BIA Files, Phoenix).

(1976)). The tracts which were described were all nonirrigable lands in the western portion of the reservation.¹¹

¹¹ Letter dated June 18, 1935, from the Commissioner of Indian Affairs to Superintendent Jolley, Fort Yuma Agency; Letters dated Dec. 13, 1939, and Apr. 6, 1943, from Superintendent Gensler, Colorado River Indian Agency, to the United States Fidelity and Guarantee Co.; Letter dated Mar. 29, 1943, from BIA Field Agent Cox, Fort Yuma Sub-Agency, to Superintendent Gensler; Letter dated Nov. 18, 1934, from H. L. Gardner to the Quechan Tribal Council; Letter dated Aug. 3, 1934, from H. L. Gardner to Superintendent Jolley, Fort Yuma Indian Agency; Notices of location of placer mining claims by Rosa Lee Black and Patsy Black on Feb. 26, 1935, filed with the Fort Yuma Indian Agency on Mar. 18 and Apr. 2, 1935, within 60 days of location as required by the 1919 Act (BIA Files, Phoenix, Claims Exhibits RO-4, RO-12, RO-15).

There is no record of management of the nonirrigable areas by the Bureau of Land Management prior to 1936. Only one document even hints at such management by the Bureau of Reclamation. On Oct. 28, 1953, an "Analysis of G.L. Account 271.22—Rental of Farming and Grazing Lands" was prepared to ascertain the portion of "Miscellaneous Non-operating Income—Other" attributable to the rental of grazing and farming lands covered into such account between 1910 and 1953. The entries are jumbled and clearly inaccurate in places. The covering memorandum states that "some of the income * * * was from Mining and Gravel Leases, and still a larger portion from lands lying outside both irrigation divisions. Probably all of the Mining and Gravel leases, as well as a sizeable portion of the Grazing and Farming leases, lie outside the two irrigation divisions." An inspection of the entries confirms that all of the leases listed in the "Gravel and Mining" column were on nonirrigable reservation lands, except perhaps Lease I24r-358 issued to Emil Frank. But all of them are entered in the ledgers *after 1940*, and most, if not all of them, are almost surely the same sand and gravel leases that were administered by the Bureau of Indian Affairs prior to 1936. See, e.g., leases I24r-417 and I24r-504 issued to H. L. Gardner and the leases issued to C. H. Trigg and Emil Frank and compare them with the BIA leases issued to the same persons as described in the documents referred to in the preceding paragraph of this note. Similarly, all the leases except for one listed in the "Outside Area" column, although covering nonirrigable portions of the reservation, were entered in the ledgers *after 1936*. See, e.g., lease I24r-415 issued to Mary E. Maxey for a gas station and lease I24r-456 issued to Callahan Construction Co. for a "Piece of

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In addition to this formal evidence of administration, there are many informal recognitions of the continued inclusion of the nonirri-

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Ground at Pot Holes" (a site in sec. 25, T. 15 S., R. 23 E.). The Mary E. Maxey lease, inaccurately placed in T. 15 S. rather than T. 16 S. of R. 21 E., is undoubtedly a lease for the same ground that was utilized by Mrs. Maxey under a BIA trader's license prior to 1936. See the documents referred to in note 10 *supra*. The one exception is lease L-30 issued to R. E. Whitmore and S. H. Flood and listed as an "Outside Area" between 1918 and 1924. However, the land description (sec. 19, T. 16 S., R. 23 E. and sec. 35, T. 15 S., R. 23 E.) includes both irrigable and nonirrigable lands, and the lease is actually listed (under Whitmore's name) for the period from 1925 to 1927 and again in 1928 in the "Reservation" Division column, which covers the irrigable lands in the Reservation Division of the Yuma Project. The "Outside Area" listing was therefore, probably an error. The term "Reservation Division" described the irrigable lands and project works of the Yuma Project on the California side of the Colorado River, as several of the maps referred to in note 8 *supra* indicate. It did not cover the nonirrigable reservation lands not used for project works. Hence the use of the "Outside Area" column in the account analysis. A study of all of the entries in the "Reservation [Division]" column shows that all of them included irrigable as well as nonirrigable lands, and the leases were no doubt for a portion of the irrigable lands. The land descriptions in the analysis ordinarily give at most the section in which the lease was contained, without providing any more precise description. Where more precise descriptions are given, they refer to specific lots or farming units in the Bard area opened to non-Indian settlement in 1910. See, e.g., leases I1r-372, L-14, and 4-11. Other leases are in sections which are entirely, or practically entirely, irrigable. See, e.g., leases I24r-202, I24r-305, I24r-307, I24r-354. Leases I24r-409 was for a "track on levee in Cal. in Res. Div." One lease whose land description defies accurate interpretation is the lease originally issued to E. F. Sanguinetti under lease number I24r-169 and described as secs. 31, 36, 1, 6 in townships 15, 15, 16 and ranges 23, 22E. It is not clear which sections are to be matched with which townships and which ranges. Some of the probable combinations would include sections which contain only nonirrigable lands, but all of these would also contain substantial project works, except for sec. 6, T. 16 S., R. 22 E., which is high up in the rocky mesa and useless for

irrigable lands within the Indian reservation. Both the Commissioner of Indian Affairs and the Director of the Reclamation Service described the Yuma Project as encompassing only "the *bottom lands* in the Yuma Indian Reservation,"¹² and the chief officers of the two bureaus repeatedly referred to the nonirrigable lands as "Indian country within the meaning of the law,"¹³ "Indians lands * * * [which] are not public lands in the ordinary sense of the word,"¹⁴ and lands the disposal of which "is primarily

farming or grazing. Considered as a whole, however, the account analysis supports BIA jurisdiction over the nonirrigable lands prior to 1936.

¹² Fifth Annual Report of the Reclamation Service: 1906, at 100 (1907) (italics added); Letter dated Feb. 23, 1906, from the Commissioner of Indian Affairs to the Secretary of the Interior (Yuma Project File 154-A, "Indian Lands," A609694). A letter dated July 18, 1913, from Reclamation Service Yuma Project Engineer Sellow to supervising engineer Hill enclosed three prints of a map showing "the entire Indian Reservation," including as one subdivision thereof "the area allotted to the Indians, amounting to about 8,200 acres" (Yuma Project File 154-A, "Indian Lands, 1910 thru June 1919," A609380, A609382-84).

¹³ Letter dated Oct. 1905, from Acting Commissioner of Indian Affairs Larabee to the Director, U.S. Geological Survey (in which the Reclamation Service was originally located), concerning police jurisdiction over the nonirrigable lands on the California side of the Colorado River being used for construction of the Laguna Dam (Yuma Project File 154-A, "Indian Lands," A609664-65).

¹⁴ Copy of memorandum dated Mar. 21, 1925, from Acting Chief Engineer Crowe, Bureau of Reclamation, to the Commissioner of Reclamation, concerning an application by Southern Sierras Power Co. for a right of way "west of the east line of Sec. 19, T. 16 S., R. 22 E., S.B.M.," which would be "across Indian lands over which the Bureau of Reclamation has proposed to construct certain works in connection with the All-American Canal to Imperial Valley." (Yuma Project File 430, "Acquisition of Lands, Indian Lands thru 1929").

within the control of the Indian Office."¹⁵

More particularly, the nonirrigable lands between the reservation levee and the Colorado River are expressly recognized as being reservation lands subject to the jurisdiction of the Indian Bureau, except insofar as such lands were necessary for the protection of the levee. In a letter dated May 28, 1906, District Engineer Homer Hamlin advised the Director of the U.S. Reclamation Service that "[t]he jurisdiction over this land will probably always remain with the Indian Bureau, as it will not be reclaimed or sold as a part of the cultivable area of the Yuma Project."¹⁶ In 1907, Superintendent Deaver of the Yuma Reservation raised the question of the status of these lands, as well as the "27000 acres of rough mesa and mountainous land unfit for agricultural purposes," in light of the failure of Congress, in the Act of Apr. 21, 1904 (33 Stat. 189), to "provide for the disposition of the balance of the reservation that is not irrigable."¹⁷ The Secretary of the Interior directed Special Inspector Levi Chubbuck of the U.S. Indian Inspection Service to investigate and report on this and other matters.

¹⁵ Letter dated June 23, 1914, from Director Newell, Reclamation Service, to U.S. Representative Carl Hayden (Yuma Project File 154-A, "Indian Lands, 1910 thru June 1919," A609414).

¹⁶ Yuma Project File 154-A, "Indian Lands," A609709-11. See *id.* A609702-13 for related Secretarial level correspondence.

¹⁷ Letter dated Apr. 11, 1907, from Superintendent Deaver, Yuma Reservation, to the Commissioner of Indian Affairs, referred by the latter to the Director of the Reclamation Service on May 7, 1907 (Yuma Project File 154-A, "Indian Lands," A609721-28).

On Apr. 6, 1907, Inspector Chubbuck reported to the Secretary, suggesting that the strip of land between the levee and the river "be formally reserved by the Indian Office" and that a parallel strip inside the levee which was not to be allotted to Indians or disposed of to non-Indians, as well as "other available places on the Yuma Reservation," be planted with fruit bearing trees, "subject to such regulations as the Reclamation Service desires to impose for the protection of the levees and ditches, the Indians' rights to the income from the products being recognized, in consideration of the fact that the reservation as a whole is theirs."¹⁸ In 1919, the Director of the Reclamation Service implicitly recognized the right of the Indian Office to irrigate "some lands in Sec. 25, T. 16 S., R. 22 E., which lie outside of our levee and consequently are not included within the proposed Yuma project."¹⁹ And in a letter dated Oct. 20, 1929, the General Land Office advised the Commissioner of Indian Affairs that:

It is the opinion of this office that the reservation boundary is defined by the center of the abandoned channel [as it existed prior to the avulsive change of 1920] * * *. The area between the levee and the abandoned channel, constituting the present Yuma Indian Reservation boundary, appears therefore to be still in public ownership and a part of the Indian Reservation.

¹⁸ Yuma Project File 154-A, "Indian Lands," A609734-39.

¹⁹ Letter dated Oct. 2, 1919, from Director Davis, U.S. Reclamation Service, to the Commissioner of Indian Affairs (Yuma Project File 150, "Acquisition of Lands, Southern Pacific Ry. Co.").

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In fact, the jurisdiction of the Bureau of Indian Affairs over the nonirrigable lands of the 1884 reservation was not challenged, insofar as the available documents show, until July 15, 1935, during the final stages of approval of the right of way for the All-American Canal. The canal was originally proposed as a private project, passing through the 1884 reservation from the southwest corner to the northeast corner, crossing allotted and unallotted Indian lands, mostly the latter. The entire right of way route was considered to be within the reservation, so that compensation would have to be paid to the Indians for both the allotted and unallotted lands.²⁰ When the Reclamation Service decided to construct the canal itself, it shifted the right of way slightly north so that only tribal lands would be involved, and, in a letter dated June 27, 1934, requested the General Land Office to submit the proposed right of way for the canal, which would involve no Indian allotments but rather "exceedingly rough territory along the edge of the Yuma mesa," to the Secretary of the Interior "(through the Commissioner of Indian Affairs) for approval under Sec. 13 of the Act approved June 25, 1910 (36 Stat. 855, 858, 43 U.S.C. § 148

(1970))," an Act applying to "lands within any Indian reservation," and hence, as the Commissioner of the General Land Office noted in his transmittal letter to the Commissioner of Indian Affairs dated July 5, 1934, administered by the Office of Indian Affairs. The Commissioner of the General Land Office also stated that "the right of way involves Indian lands."²¹ The Reclamation Service's reversal of position in 1935 seems to have been prompted by its receipt of a report dated Mar. 12, 1935, making substantial claims for compensation and consideration on behalf of the Quechan Indians.²² The resulting dispute led to the 1936 Solicitor's Opinion.

Although Congress did not deal with these lands between 1894 and 1936 in any manner which would reveal its understanding of their status, there is a statement in the Congressional Record²³ by Representative Stephens of Texas on Dec. 6, 1912, approximately two years after Congress enlarged the allotments to 10 acres, and near the time when the canal constructed through the reservation was completed, implying that the "large amount of land up on the mesa" (that is, most of the "nonirrigable" lands which are affected by this Opinion) was in Indian ownership at that time. And, during hearings in San Diego,

²⁰ See, e.g., "Right of Way Plats of the All American Canal through Tribal and Allotted Indian Lands of the Yuma Indian Reservation," dated Jan. 1928; "Schedule of Appraisements Covering Right-of-Way Across Yuma Indian Reservation, Etc.," covering unallotted lands therein, signed Apr. 27, 1928 (Claims Exhibits RO-7, RO-10).

²¹ Claims Exhibit RO-7. See in addition the Bureau of Reclamation document cited in note 14 *supra*.

²² *Id.*

²³ 49 Cong. Rec. 748.

Calif., on June 29, 1934, Chairman Wheeler of the Senate Committee on Indian Affairs referred to "the All-American Canal constructed in connection with the Boulder Dam project and running across the lands of the Indians down there [in the Yuma Indian Reservation]" and told John Curran, a Yuma Indian concerned about compensation for the right of way, "They will have to pay you for it, if they take your land."²⁴

Solicitor Austin's 1977 Opinion devotes much effort to establishing that the Department's administrative practices with respect to these lands were inconsistent at best. After carefully reviewing his discussion, it seems clear that the isolated deviations do not alter the fact that this Department treated the nonirrigable acreage as belonging to the Indians.

An example of why the 1977 analysis of administrative practices is unpersuasive can be found on p. 29 of that Opinion where Solicitor Austin quotes a 1903 letter from the Commissioner of Indian Affairs on the subject of the nonirrigable lands. The quoted language, however, is taken somewhat out of context as can be seen from the remainder of the Commissioner's discussion which is found in footnote 16. Taken as a whole, the Commissioner's statement does not offer strong support for the proposition that the nonirrigable lands had

been ceded. Secondly, Solicitor Austin cited a series of letters by government officials, giving their opinion of the effect of the 1893 agreement. However, such statements appear to me to be more in the nature of gratuitous comments, rather than researched legal opinions, and they do not deal with the *essential issue* of how the lands were administered. In fact, the comments quoted appear to be confused on the point of whether the nonirrigable lands were public domain lands. And, as Solicitor Austin then stated on p. 31 of the 1977 opinion:

* * * there is a great deal of administrative material that indicates that the subject of non-irrigable lands were administered as Indian lands or were, at least, considered to be a part of the Yuma Reservation subsequent to 1894. In some cases, it will be noted that some of the same officers who determined that the Indians had ceded the subject lands also dealt with administrative details pertaining to those lands as though they were Indian lands.

Thirdly, the 1977 Opinion relies strongly on the Warboys' survey in 1928 as evidence of the Government's view of the current reservation boundaries. However, it has been pointed out that the surveyor's notes²⁵ indicate that the surveyor was not instructed to or attempting to define the reservation boundaries, as affected by the cession agreement. Moreover, Warboys' comment, cited by Solicitor Austin, only dealt with the status of *irrigable* lands and not of the nonirrigable lands. Therefore, the survey does little to per-

²⁴ *Survey of Conditions of the Indians in the United States, Hearings before a Subc. of the Senate Comm. on Indian Affairs*, pt. 33, 73d Cong., 1st Sess. 17245 (1935). See *id.*, pt. 2, 70th Cong., 2d Sess. 628-29 (1929) (reference to lease of Quechan tribal lands).

²⁵ Field Notes of Survey executed by John L. Warboys, under Special Instructions of May 14, 1928, Group No. 152.

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suade one that it reflected the Government's view of the continuing status of the nonirrigable lands. A last example of the unpersuasive line of argument taken to discredit evidence of administrative practices is the statement that the cession of the nonirrigable lands was not entered on the tract books until the 1960's which may explain why the lands were administered as Indian lands. The nonentry in the tract books does more to suggest that the Government did not consider the nonirrigable lands ceded than it does to diminish the impact of administrative treatment as tribal lands.

I am persuaded that the administrative treatment reflects what must have been the prevailing view that the lands had not been separated from the reservation. Even if there were some inconsistency, such inconsistency does not detract from the legal significance of an undeniable pattern of administration of the lands as tribal lands. In any event, neither the executive nor the legislative branches of the Government treated the 1893 Agreement and the 1894 Act as having worked an immediate cession of any reservation lands or termination of the reservation.²⁶

In conclusion then, it appears far more likely than not, considering

the actual language of the documents, the stated purpose of the Indians, the circumstances surrounding the negotiation of the agreement, the fact that the agreement was negotiated under the authority and therefore prescribed compensation terms of the General Allotment Act, and the overwhelming evidence of continuing treatment of the subject lands as reservation lands, that an immediate automatic cession of the irrigable and nonirrigable lands was not intended by either party to the agreement. Rather, it seems more logical that the cession of the reservation lands was contingent upon what the Indians perceived as adequate compensation—allotment to them of irrigable lands, sale of their surplus lands under profitable terms, the proceeds to be held in trust for the Tribe, the construction of an irrigation canal, and the opening of the area to settlement. I can find no legal or factual basis for separating the nonirrigable lands from the irrigable lands and deciding that the nonirrigable lands were not subject to fulfillment of such conditions. Indeed, strong argument can be drawn from the nonirrigable acreage section that cession of those lands was specifically tied to the condition that the area be returned to the public domain by executive order, opened to settlement and the tribe compensated as the lands were sold to settlers.²⁷

²⁶ In 1900, both the Dept. of the Interior and the President felt it was necessary to issue an executive order (dated December 19, 1900) to withdraw certain lands in the then Territory of Arizona from the reservation by revoking the 1884 Executive Order as to those lands.

²⁷ Although the 1894 Act does not provide as detailed a description of the various duties of the Government as trustee as was the case in *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), some form of trusteeship status may

I believe that the foregoing interpretation of the agreement comports with the previously cited canons of construction relating to Indian agreements and statutes, in that it considers all relevant circumstances to determine what the parties intended and it resolves what may be ambiguous in the Indians' favor. Moreover, this interpretation is appropriate in light of the well established legal principle that Congressional action terminating or altering Indian property rights is not to be lightly inferred. Such Congressional intent must be clear.²⁸ Indeed, this interpretation is so well founded on the available information that to espouse the opposite interpretation, that the Indians ceded the nonirrigable lands for virtually no consideration, would violate this Department's obligation as trustee to follow an ordinary fiduciary standard in dealing with Indian

property rights, *Seminole Nation v. United States*, 316 U.S. 286 at 297 (1942).

As the foregoing discussion of the Government's intent regarding the nonirrigable lands has demonstrated, the Government's intent and subsequent administration of the agreement and legislation certainly do not substantiate the interpretation that Congress intended to take title to those lands. There is no room, moreover, for asserting that the conditions of the agreement and ratifying statute were fulfilled, in any way, during the decade following the enactment of the ratifying statute. Therefore, no cession of the reservation lands became effective during that period.

The 1904 Act

The second legal issue on which correct resolution of the title question turns is: whether, as the 1977 Opinion holds, the 1904 Act providing an allotment and irrigation scheme for both the Fort Yuma and Colorado River Reservations, was intended to implement the 1893 agreement and ratifying statute by fulfilling the United States' obligations undertaken in that agreement. The 1904 Act does not, as explained below, evidence Congressional intent to fulfill the conditions of the cession agreement and 1894 statute and to execute the cession of all the reservation lands, including the nonirrigable acreage. The case is more compelling, based on the language of the Act, as well as its legislative history, that Congress intend-

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be imputed to the Government over the Indian land until the fulfillment of the stated condition. While the 1936 Opinion recognizes that the agreement can be construed as conditional, Solicitor Margold concluded that the opening of the nonirrigable land was not a material condition. But, the fact that the requirement appears in the Agreement and is expanded in the Act indicates its importance to the Indians and to Congress. Otherwise, the parties could merely have stated that the land was ceded to the United States or placed in the public domain. Second, one policy of the General Allotment Act of 1887, 24 Stat. 388, which statute we have been recently told by the Supreme Court is relevant to the understanding of Indian legislation of the period (*Mattz v. Arnett*, 412 U.S. 481 (1973)), was to further the assimilation of Indian tribes into the non-Indian community. The condition of opening the lands to non-Indian settlement was, then, essentially part and parcel of a primary national policy with respect to Indians at the time.

²⁸ *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

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ed to create an entirely new scheme for the irrigation of the area under which there was no cession of "non-irrigable" lands. The language and entire purpose of the 1904 Act were restricted to allowing the "irrigable" reservation lands to be developed under the Reclamation Act of 1902 and the Act should not be interpreted as either a repeal or an implementation of the 1894 statute.

The Act of Apr. 21, 1904, Sec. 25, 33 Stat. 224, states:

That in carrying out any irrigation enterprise which may be undertaken under the provisions of the reclamation Act of June seventeenth, nineteen hundred and two, and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian reservations in California and Arizona, the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain: *Provided*, That there shall be reserved for and allotted to each of the Indians belonging on the said reservations five acres of the irrigable lands. The remainder of the lands irrigable in said reservations shall be disposed of to settlers under the provisions of the reclamation Act: *Provided further*, That there shall be added to the charges required to be paid under said Act by settlers upon the unallotted Indian lands such sum per acre as in the opinion of the Secretary of the Interior shall fairly represent the value of the unallotted lands in said reservations before reclamation; said sum to be paid in annual installments in the same manner as the charges under

the reclamation Act. Such additional sum per acre, when paid, shall be used to pay into the reclamation fund the charges for the reclamation of the said allotted lands, and the remainder thereof shall be placed to the credit of said Indians and shall be expended from time to time, under the direction of the Secretary of the Interior, for their benefit.

In 1911, the statute was amended to provide for 10-acre rather than 5-acre allotments. Act of March 3, 1911, 36 Stat. 1058, 1063.

As in the case of the 1893 agreement and 1894 ratifying statute, the face of the 1904 Act does not compel any one interpretation concerning the effect of the Act on the cession of the nonirrigable lands. The language of the 1904 statute does not refer to the 1893 Agreement or to the status of nonirrigable lands. In fact, the statute does not limit its focus to the Fort Yuma Reservation but includes the Colorado River Reservation. The Act, moreover, authorizes a substantial reclamation project intended to include both Indian and nonreservation lands. The Act states that the Yuma project would take place "in connection with the reclamation of other lands." Furthermore, the 1904 Act, which does not refer to the non-irrigable lands, provides for *different* allotment and surplus land sale procedures from those agreed to by the parties in 1893 and subsequently ratified by Congress.

The 1894 Act provided for the United States to bear the cost of surveying and appraising the sur-

plus irrigable lands and to sell the lands at public auction with the proceeds from sale of these lands to be placed in a fund, with interest at 5% per annum, for the benefit of the Indians. The 1894 Act also provided that the private canal company, which was given three years to commence construction, must for ten years provide free water for one acre for each male adult Indian utilizing that water for growing crops. The canal company was also to bear the cost of canal construction. The 1904 Act, by contrast, made no provision for free water. It also credited to the Indians only that portion of the proceeds of sale as surplus irrigable land reflecting the value of the land *before* reclamation. Otherwise, the "surplus" irrigable lands were simply opened to settlement under the homestead laws, rather than being sold by the more favorable procedure of a public auction. The only other charges were for construction of the reclamation projects and these were not payable to the Tribe. Moreover, out of the amount the Tribe did receive under the 1904 Act, there would be taken the sum required to pay the reclamation charges for the land allotted to the Indians, a sharp contrast to the canal being constructed free of charge in the 1894 Act. Any balance remaining was held in a fund for the benefit of the Indians *without* provision for interest, as contrasted to the five percent interest provided in the 1894 Act.

Reference to the legislative history is helpful and appropriate in

construing the scope of the Act. The 1904 Act was proposed by the Department. The Senate Report records in the letter of the Director of the Geological Survey, also read into the Congressional Record,²⁹ to the effect that the 1893 Agreement and 1894 Act had created a scheme for irrigation which never was realized, and that Congress was not to be restricted by the prior Agreement and Act, including the failure of the canal venture. This letter made specific reference to two contemporaneous Supreme Court decisions establishing that Congress was not bound by such agreements but "has full power to dispose of the Indian lands in such manner as it may consider best fitted for the benefit of the Indians."³⁰ The Senate Report then records a letter from the Commissioner of Indian Affairs which states that:

The problem of providing these two reservations with irrigation systems is one which this office has thus far been unable to solve, and it therefore gives its hearty assent to the proposition of the Director of the Geological Survey, and earnestly recommends its adoption, believing that it promises relief to these Indians.³¹

A purpose, stated in the legislative history for bringing a reclamation project to the reservation was to construct a "portion" of a "general" and comprehensive system of utilizing the waters of the river to the best possible advantage".³²

²⁹ 38 Cong. Rec. 2811.

³⁰ *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902) and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), cited in 58th Cong. 2d Sess., Senate Report No. 1660 at 28.

³¹ *Id.* at 29.

³² *Id.* at 38.

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It appears that some material in the legislative history might be susceptible of divergent interpretations. For example, the reference to the Yuma Indians' having already assented to allotments of five acres each ties the 1904 Act to the 1894 statute. But, I think that does little more than indicate what is already clear, that is, that Congress was aware of the 1894 statute. It does not compel the conclusion that the 1904 Act was an implementation of the prior act and cession agreement, with all the ramifications thereof. In addition, the letter from the Director of The Geological Survey, referred to above, might be interpreted as evidence of Congressional intent to implement the Act and cession agreement. But, the discussion in that letter is more susceptible to the interpretation that Congress believed it did not have to take action to acquire Indian land title before disposing of such land. In other words, effectuation of the cession agreement was not at all necessary for Congress to accomplish its stated purpose in 1904, namely provision of irrigation on the reservation as part of a major reclamation project involving the Colorado River. When it is clear that Congress knew it did not have to acquire Indian lands by cession before it could dispose of them, the burden of proving that Congress intended to effectuate a cession becomes more difficult. This is particularly true in the case of these nonirrigable lands

which were nowhere mentioned in the Act or in the Director's letter.

In addition to the legislative history, the administrative practices, detailed earlier in this Opinion, support the interpretation that the title to the nonirrigable lands was not affected by this enactment.

In conclusion, interpreting the 1904 Act as an intended implementation of the cession agreement has little, if any, support in either the language, the legislative history, or subsequent administrative practice. Such interpretation would not conform with the applicable rules for interpreting Indian statutes,³³ particularly the rule that the cession of Indian property rights may not be lightly inferred. I think the interpretation which follows the language and stated purpose of the 1904 Act most closely is that the Act was not intended to implement and give legal effect to the agreement for the cession of the Fort Yuma lands. Rather, the nonirrigable lands were not affected in any practical way by that Act. Therefore, the conditional cession of the nonirrigable lands remained unaffected and title to those lands remains in the Quechan Tribe.

In the preceding discussion, I have explained why I have concluded that the Agreement and the 1894 statute must be construed as providing for a conditional conveyance of the nonirrigable lands; the 1904 Act did not, contrary to the

³³ See cases cited in footnote 3, *supra*.

1977 opinion of the Solicitor, implement the 1893 Agreement and ratifying Act. As a consequence, that conveyance was not validly effected. The 1977 opinion is overruled. Title to the subject property is held by the United States in trust for the Quechan Tribe. That title, however, is subject to interests which have vested in third parties as noted above.

LEO KRULITZ,
Solicitor.

MABLE M. FARLOW

(On Reconsideration after Hearing)

39 IBLA 15

Decided January 11, 1979

Reconsideration after hearing before Administrative Law Judge Ratzman of decision of the Oregon State Office, Bureau of Land Management, rejecting color of title application OR-12944.

Affirmed.

**1. Color or Claim of Title: Generally—
Color or Claim of Title: Cultivation—
Color or Claim of Title: Improvements**

To satisfy the requirements of a class 1 claim under the Color of Title Act, "valuable improvements" must exist on the land at the time the application is filed, or it must be shown that the land has been reduced to cultivation. If land was once cultivated, but is not cultivated at the time the application was filed and has not been cultivated for 10 years previously, the cultivation requirement of the Act has not been satisfied.

2. Color or Claim of Title: Description of Land

While the general rule is that a color of title claim must be based on a deed or other written instrument which on its face purports to convey the land sought, extrinsic evidence may be used to make definite the description in a deed which contains a latent ambiguity.

3. Administrative Procedure: Burden of Proof—Color or Claim of Title: Generally

The burden of proving a valid color of title claim is on the claimant. Where it cannot be said from the evidence presented that the grantors and grantees in the claimant's chain of title acquired a parcel of land with the bona fide belief that the parcel included all the land claimed, the color of title application must be denied.

4. Color or Claim of Title: Description of Land—Color or Claim of Title: Good Faith

Where extrinsic evidence does not adequately show that predecessors in a color of title claimant's chain of title, whose holdings must be tacked on to establish the requisite 20 years holding for a class 1 claim, could have a bona fide basis for believing that land described as lot 5, shown on the official Government plat on one side of a river, included land on the opposite side of the river, there could not be a good faith holding under color of title.

APPEARANCES: Dennis C. Karnopp, Esq., and C. Montee Kennedy, Esq., of Panner, Johnson, Marceau, Karnopp & Kennedy, Bend, Oregon, for appellant. Robert H. Memovich, Esq., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

(ON RECONSIDERATION AFTER HEARING)

January 11, 1979

INTERIOR BOARD OF LAND APPEALS

Mable M. Farlow filed application OR-12944 under the Color of Title Act, Dec. 22, 1928 (45 Stat. 1069), *as amended*, 43 U.S.C. § 1068 *et seq.* (1970) (hereinafter the Act), on June 27, 1974, for certain land west of the Deschutes River in sec. 12, T. 6 S., R. 13 E., Willamette meridian, Wasco County, Oregon. The deeds in appellant's chain of title described lots 3, 4, and 5 of sec. 12. On the official survey plat approved in 1883 these lots were shown to lie on the east side of the Deschutes River. That plat also showed a lot 6 on the west side of the river opposite lot 5. A dependent resurvey by the Bureau found that there were omitted lands in sec. 12 on the west side of the river between lot 6 and the river, and subdivided them. It is the land now designated as lot 8 by the resurvey which appellant claimed was covered by deed descriptions of lot 5, based upon certain maps and other information apart from the official 1883 survey. Appellant contended, in effect, that such extrinsic evidence showed that lot 5 straddled both sides of the river and gave a color of title to the land on the west side of the river. On Apr. 14, 1975, the Oregon State Office, Bureau of Land Management (BLM), rejected the application because no deed or written instrument in appellant's chain of title described land west of the Deschutes River.

Appellant appealed the BLM decision to this Board. On June 7, 1977, we set aside the decision and ordered a hearing to consider "extrinsic evidence to establish whether the deeds in her chain of title were based upon plats, records and other documents which can be read together with the deeds as creating a color of title beyond the actual title shown on an official federal survey plat," and whether there has been compliance with other requirements of the Act. *Mable M. Farlow*, 30 IBLA 320, 321, 84 I.D. 276 (1977).

As we stated in our prior decision:

This case arose because the 1882 survey, * * * erroneously meandered the Deschutes River as flowing through the approximate center of the S $\frac{1}{2}$ SE $\frac{1}{4}$ of section 12. By lot 5, the river actually curves and flows closer to the east township boundary. A 1972-73 dependent resurvey established new meanders of the river and subdivided the omitted lands in section 12 which are west of the river * * * [into lots 7 and 8]. The position of patented lot 5 is also shown in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ [on the plat approved in 1974] but east of the river and is much smaller than shown on the 1883 survey plat.

Mable M. Farlow, supra, at 323.¹

The hearing was held Apr. 26, 1978, in Redmond, Oregon, before Administrative Law Judge Dean F. Ratzman. His proposed findings and recommended determinations were made Sept. 18, 1978. In his recommended decision at p. 4,

¹ For a discussion of the rules governing boundaries along a meandered watercourse see the earlier decision, *Mable M. Farlow*, 30 IBLA 320, 84 I.D. 276 (1977).

Judge Ratzman sets out further certain facts in this case:

The chain of title to properties in private ownership begins with a 1904 patent for land described as lots numbered 3, 4 and 5 in Section 12 according to the plat of survey approved in 1883. That survey plat depicts Lot 5 as containing land in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 12 east of the river amounting to 30.96 acres. As has been indicated, land in the S $\frac{1}{2}$ SE $\frac{1}{4}$ which is west of the river is designated on the 1883 plat as lot 6. [The unpatented portion of the E $\frac{1}{2}$ of section 12 was withdrawn from entry in 1908. In 1930, Lot 6 was restored.]

Transfers during 1927-1943 continued the reference to the conveyed lands as Lots 3, 4 and 5. In 1946 Mr. and Mrs. Farlow purchased Lot 5 for \$50. The deed recited that mineral right to any part or parcel lying west [east] of the river were retained by the grantor.²

At present there are no improvements on the claimed lands (Exs. 11, 11-A, Tr. 92, 98). The property was utilized to some extent for livestock grazing and raising turkeys. Tr. 92. A portion of the land was cultivated for part of the period between 1953 and 1964 by a tenant. The tenant, Mr. Johnson, paid \$300 per year rent to the Farlows. He lived on adjacent Lot 2 during this period of time. Tr. 92, 93.

Judge Ratzman concluded, at p. 9:

The 1908 withdrawal precludes approval of Mrs. Farlow's application. The applicant has failed to show that the cultivation or improvement requirement has been met. She has not substantiated the assertion that the Farlows and their predecessors in interest, held the lands in good faith under claim or color of title for more than twenty years. The application should be denied.

Appellant and BLM were allowed time in which to respond to

² Judge Ratzman mistakenly said "west" here. The reservation was of rights lying east of the river. 30 IBLA 323.

the recommended decision. Appellant takes issue with Judge Ratzman's conclusions on three points. First, appellant argues that the land is open to entry and not withdrawn. Second, appellant states that she has met the cultivation or improvement requirement of the Act, thereby raising an equity in her favor. Appellant's third argument is that she has established good faith, adverse possession for more than 20 years under claims or color of title.

Our earlier statement that "the land west of the river is public land subject to a color of title application,"³ was predicated on an assumption that the land was not subject to a withdrawal. The issue of withdrawal was raised for the first time at the hearing. Because of our agreement with Judge Ratzman, otherwise, that appellant has failed to prove her color of title claim, it is unnecessary to decide the effect of the 1908 withdrawal and 1930 restoration of the E $\frac{1}{2}$ of sec. 12 on the omitted land.

[1] The Color of Title Act, 43 U.S.C. § 1068 (1970), directs the Secretary of the Interior to issue a patent

* * * whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, * * *.

In 43 CFR 2540.0-5(b), a claim under this provision of the Color of

³ *Mable M. Farlow, supra* at 326.

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Title Act is called a "class 1" claim. To be entitled to a patent, the claimant must establish that each of the requirements for a class 1 claim has been met. *Lawrence E. Willmorth*, 32 IBLA 378 (1977); *Jeanne Pierresteguy*, 23 IBLA 358, 83 I.D. 23 (1976). The record in this case supports Judge Ratzman's conclusion that appellant has not established good faith possession under color of title for more than 20 years, or proved the existence of valuable improvements or cultivation as required by the Act.

On the issue of improvements or cultivation, appellant offered evidence that a small cabin was once placed on the land but in the early 1940's had been moved to other land. To satisfy the Act, the "valuable improvements" must exist on the land at the time the application is filed. *Lawrence E. Willmorth*, *supra*; *Lena A. Warner*, 11 IBLA 102 (1973); *Arthur Baker*, 64 I.D. 87 (1957). That there was once an improvement on the land which was removed many years prior to the application certainly does not suffice. *Id.* There was also evidence that appellant rented the land in "the late 1950's and early 1960's" (Tr. 92) for \$300 per year and the tenant raised a "crop of grain or hay or something for his horses" and also "a large garden" (Tr. 76). Appellant asserts that this evidence raises an equity in her favor. As Judge Ratzman points out at p. 8:

Buying land for \$50 in 1946, and merely collecting an annual rental of \$300 for several years while the renters made an

effort to cultivate does not develop an equity—no facts have been provided as to the area cultivated, yields of hay, grain or vegetables, or any permanent improvement to the land which resulted from the cultivation. Reduction of the land to cultivation in the sense intended in the Act has not been shown.

We agree. Generally, throughout the public land law "cultivation" is viewed as a continuing activity with necessary efforts leading to the production of crops. For example, under the homestead laws where cultivation for a period of years has been necessary to meet the requirements for a patent, this Department has consistently ruled that there must be a breaking, planting, or seeding and tillage for a crop to be done in such a manner as to be reasonably calculated to produce profitable results. Acts which did not demonstrate good faith efforts cannot be considered "cultivation" under the law. *E.g.*, *Clarence Ray Mathis*, 29 IBLA 150 (1977); *United States v. Nelson (Supp. I)*, 28 IBLA 314 (1977); *United States v. Garrett*, A-31064 (May 28, 1970); *Jess H. Nicholas, Jr.*, A-30065 (Oct. 13, 1964). Here, appellant's application was filed in 1974. From her own evidence, there is no indication of cultivation of the land for at least 10 or more years prior to the filing of the application. Thus, even if we found that land had once been cultivated by appellant's tenants and that would have sufficed under the Color of Title Act to be cultivation at the time crops were being produced, it cannot suffice

now. It cannot be said that land "has been reduced to cultivation" where there has been no effort at tillage of the land or other efforts made to produce a crop for at least 10 years. As we indicated that it is necessary to meet the improvement requirement at the time an application is filed, it is also clear that the Act envisages that the land "has been reduced to cultivation" at that time also. We need not decide here whether any breaks in cultivation activity could be accepted. It is sufficient to rule here that where land is not cultivated at the time the application has been filed and has not been cultivated for 10 years previously, the cultivation requirement of the Color of Title Act has not been satisfied.

[2] We have previously ruled in this case that appellant's good faith adverse possession under claim or color of title for more than 20 years must extend back to the 1939 conveyance from Fischer to Troutman.⁴ We also held that while the general rule is that a color of title claim must be based on a deed or other written instrument which on its face purports to convey the land sought, *Manley Rustin*, 28 IBLA 205, 83 I.D. 617 (1976); *James E. Smith*, 13 IBLA 306, 80 I.D. 702 (1973), "extrinsic evidence may be

used to make definite the description in a deed which contains a latent ambiguity * * *." *Mable M. Farlow*, *supra* at 329.

[3] The burden of proving a valid color of title claim is upon the claimant. *Lawrence E. Willmorth*, *supra*; *Jeanne Pierresteguy*, *supra*. The evidence presented at the hearing failed to establish good faith possession under claim or color of title for more than 20 years. Judge Ratzman summarized the evidence as follows:

The only map in evidence that unquestionably was prepared prior to 1965, which shows Lot 5 as being on both sides of the river, is a railroad map. Mrs. Farlow had never seen a homesteading survey plat map of the type referred to in the Statement of Reasons. Tr. 98. Mr. Hunt testified as to blueprints of homestead entries but didn't know who prepared them. He had given them away, but indicated that they may have been prepared by a government agency. Tr. 43, 44.

Mr. Pat McLoughlin of Wasco Title Company, stated in an affidavit in support of Mrs. Farlow's application, that maps of the County Assessor's Office and other public records have shown for at least 50 years that Lot 5 lies on both sides of the Deschutes River. His testimony at the hearing revealed that Mr. McLoughlin had not looked at Wasco County Assessor's maps until 1960. Tr. 13. He had no personal knowledge whether the assessor's maps as of 1951 showed Lot 5 as extending across the river. The so-called "old assessor's map" was examined by McLoughlin for the first time in 1962. Tr. 29. It is his recollection that it showed part of Lot 5 west of the river at that time. However, the map which was attached to the Statement of Reasons (Exhibit 1) contains information which was made available to the public in 1965.

⁴ At 30 IBLA 330 we held: "Appellant and her husband learned of their defective title in 1961 during a lawsuit brought by their grantor to cancel the 1946 deed. Also in 1961, appellant's husband applied for a grazing lease on the lands from the United States. Therefore, appellant's 20-year period of good faith possession must pre-date 1961 and must include the conveyances of Mar. 25, 1939, and June 30, 1943." See *Joe I. Sanchez*, 32 IBLA 228 (1977).

(ON RECONSIDERATION AFTER HEARING)

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An investigation by B.L.M. Realty Specialist Champ Vaughan, including inquiries at the Assessor's Office, failed to turn up assessor's maps older than 1965. Tr. 131. He was unable to obtain any specific information as to when any maps first showed Lot 5 as being on both sides of the river. Tr. 134. There is no evidence that the railroad map or homesteading survey plat maps were on file in the county records. When he made his recent investigation a 1933 Metsker map showing Lot 5 to be entirely on the east side of the river was on file in the office of the County Assessor. Tr. 119.

County tax records prior to February 1961, showed the assessment either as "Lot 5 EX. 1.20 A R/W 29.76 Acres" (from December 1946 to February, 1961) or as "Lots 3, 4, 5 EX 9.27 A R/W 55.44 Acres" (this notation was used prior to December, 1946). (Exhibits B through B-3). The 29.76 acres land area is the same as the one shown on the 1883 survey map. The record made at the hearing fully supports the following statements in 30 IBLA 330-331.

"It was not until 1946 that Lot 5 was severed from the entire parcel. From the charts, plats and maps in the record it appears that the error in the placement of the river by the 1883 survey did not so greatly affect the total acreage of the three lots [3, 4, and 5], which were all on the east side of the river. In comparison, the change in the river's location now shows the area shown on the 1883 plat as lots 3 and 4 to be much larger, with only lot 5 suffering a loss of acreage."

Exhibit B-4, a Wasco County tax record covering entries from February, 1961 through May, 1964, reveals that a change was made during that period, incorporating a reference to a portion of Lot 5 lying west of the river. This change in the tax and assessment document seemingly was made to reflect the fact that the Farlows conveyed to Mr. Hunt a segment of Lot 5 lying east of the river. Thus, it was not until 1961 that the tax authorities gave any indication that they

considered part of Lot 5 to be west of the river.⁵

Recommended Dec. 4-5.

Under the Act the lands must have been held in good faith under claim or color of title for more than twenty years. Under the decision of the Interior Board of Land Appeals, the good faith possession of Mrs. Farlow or her grantors, under claim or color of title, must extend back to March 25, 1939, when Gertrude Fischer transferred Lots 3, 4 and 5 to Dorothy Troutman (Exhibit A-3). Mrs. Troutman's husband, A. E. Troutman, acquired and sold land in the Maupin area and was alert and careful in his business dealings. According to his sister-in-law, Mrs. Herrling, he made a careful check before he entered into a business transaction. Tr. 57.

It is the contention of the applicant that it should be presumed that because of Mr. Troutman's habitual care and prudence in land transactions he was aware of the railroad map or other documents which may have shown part of Lot 5 on both sides of the river, and believed that part of the property was on the west side when his wife acquired it in 1939. One could speculate that he acted in that belief when he arranged for the transfer. However, there is as much reason to surmise that by checking the Land Office records, or a Metsker map he learned that the official survey showed that land tract entirely on the east side of the river. It is possible that Mr. Troutman made his investigation in 1927 when he first acquired Lots 3, 4 and 5—the 1939 Fischer to Troutman transfer was a re-acquisition. It has not been established with certainty that in 1927 the railroad map depicted a portion of Lot 5 lying west of the river. With respect to 1927, the only fact that can be stated with confidence is that information regarding the 1883

⁵ In any event, the mere paying of State or local taxes on Federal land is not sufficient to support a class 1 color of title claim. See *Manley Rustin, supra*.

survey was available. It has not been proven that either Mrs. Troutman or Mr. Troutman acquired Lot 5 in the belief *bonae fidei* that part of that lot was on the west side. This is the single greatest deficiency in Mrs. Farlow's case and it requires rejection of the application even if other inadequacies are ignored. [*Italics in original.*]

Recommended Dec. 8-9.

From our review of the record in this case, we find Judge Ratzman's evaluation of the evidence and conclusion correct.

[4] To summarize then, we conclude that it was necessary for appellant's predecessors in her chain of title, whose holdings must be tacked on to establish the requisite 20 years holding for a class 1 claim, to have had a bona fide basis for believing that lot 5 included land on the opposite side of the river from that shown on the official United States' plat of survey at the time of conveyances to and from them. However, the extrinsic evidence produced at the hearing did not adequately show that there was another lot 5, different from that shown on the United States' plat of survey, which was intended in the conveyances discussed above. Thus, there was not a good faith holding under color of title for the time required by the Act.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the recommended determination of Judge Ratzman, so far as consistent with the views expressed herein, is ac-

cepted and the application is denied.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

COAL LEASING PROGRAM—RELATIONSHIP OF THE COST OF SURFACE OWNER CONSENT TO RECEIPT OF FAIR MARKET VALUE FOR FEDERALLY OWNED COAL

M-36909

January 15, 1979

1. Coal Leases and Permits: Leases—Mineral Leasing Act: Generally—Surface Mining Control and Reclamation Act of 1977: Surface Owner Consent.

The Secretary may, in computing the fair market value of coal to be leased competitively under privately owned surface, assume a limited surface owner consent cost, based on losses and costs to the surface estate and operation and similar evaluations, regardless of the actual price paid or the amount which a surface owner could otherwise demand for consent.

Assumption of a limited surface owner consent cost to be used in place of actual cost in the computation of fair market value of coal to be leased competitively is necessary to ensure receipt of fair market value by the public as required by 30 U.S.C. § 201(a) (1976).

In the exercise of his discretion to lease under the Mineral Leasing Act, the

January 15, 1979

Secretary has authority to decline to issue a coal lease where surface owner consent costs prevent the public from realizing a fair return on the value of the coal.

*OPINION BY
OFFICE OF THE SOLICITOR*

TO: SECRETARY

FROM: SOLICITOR

SUBJECT: COAL LEASING PROGRAM—
RELATIONSHIP OF THE COST OF
SURFACE OWNER CONSENT TO
RECEIPT OF FAIR MARKET
VALUE FOR FEDERALLY OWNED
COAL

ISSUE

The question to which this memorandum is directed is whether the Secretary, in computing the fair market value of Federal coal to be leased competitively under privately owned surface, may assume a ceiling cost of obtaining surface owner consent based on losses and costs to the surface estate and operation, thereby perhaps limiting the amount which will be paid to surface owners for consent to mine the underlying coal.

SUMMARY

I have concluded that the Secretary may, in computing fair market value, assume a limited surface owner consent cost based on losses and costs to the surface estate and

operation or similar evaluations, regardless of the actual price paid or the price which a surface owner could otherwise demand for consent. Since the Department will set the minimum acceptable lease bid on the basis of this calculation, potential lessees may be constrained by competition to hold prices paid for consent at or below the ceiling in order to be able to pay the minimum bid and still recover the coal profitably. Thus, surface owner consent prices might be limited indirectly by the structure of the leasing process, without Departmental involvement in private consent negotiations.

My conclusion rests on several bases, principally these:

1. By law, the Secretary may lease coal competitively only upon receipt of a lease bid which is not less than the fair market value of the coal. The method used must ensure that the full value of the coal in place is returned to the United States, *i.e.*, that even if a payment is made to the surface owner in excess of losses and costs to the surface estate and surface operation, the Secretary must still get a fair payment for the value of the coal.

2. In the exercise of his discretion to lease under the Mineral Lands Leasing Act, the Secretary has authority to decline to issue a coal lease for many reasons, including situations where surface owner consent payments prevent the pub-

lic from receiving a fair return on the value of the public's coal.

3. Calculation of fair market value as proposed or Secretarial refusal to issue coal leases; because of excessive surface owner consent payments, which may have the effect of limiting surface owner consent prices, is consistent with the intent of Congress in enacting the Surface Mining Control and Reclamation Act of 1977.

The following discussion explains in greater detail the circumstances which raise the question and the legal considerations which lead to my conclusion.

DISCUSSION

Background

In the western states, a large portion of the land overlying federal coal is in private ownership. Originally, the acquisition of surface owner consent was but one alternative method for a lessee of the coal to obtain the right to mine. Its absence did not preclude leasing or mining, since the lessee was entitled to enter and mine upon posting bond or paying damages. 43 U.S.C. § 299 (1970). On most of these split-estate lands, the surface owner had the right to compensation only for damages to improvements, crops, and grazing values. 30 U.S.C. §§ 54, 81 (1976); 43 U.S.C. § 299 (1970).

With the passage of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (to be codified in 30 U.S.C. §§ 1201-1328 (1976)), Congress placed the surface owner

in a position of greater control by making the authority of the Secretary to lease Federal coal under privately owned surface subject to the consent of the surface owner.

For persons who meet the requirements of a "surface owner," *i.e.*, (1) hold legal or equitable title to the land surface, (2) have their principal place of residence on the land or personally conduct ranching or farming operations on the land or receive a significant part of their income from ranching or farming on the land, and (3) have met those conditions for three years, the following limitation on leasing applies (SMCRA § 714(c)) :

The Secretary shall not enter into any lease of Federal coal deposits until the surface owner has given written consent to enter and commence surface mining operations and the Secretary has obtained evidence of such consent. * * *

SMCRA does not limit the amount which a surface owner can receive for his consent. The consequences of the absence of limitation become apparent when sec. 714(c) is read in conjunction with the mineral leasing laws. Sec. 714(b) of SMCRA provides that Federal coal deposits under private surface shall be offered for lease under sec. 2(a) of the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 201(a) (1976), *as amended*. Sec. 2(a) *as amended* by sec. 2 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 201(a)(1) (1976), Pub. L. No. 94-377, 90 Stat. 1083, Aug. 5, 1976, provides that, in leasing Federal coal:

No bid shall be accepted which is less than the fair market value, as deter-

SURFACE OWNER CONSENT TO RECEIPT OF FAIR
MARKET VALUE FOR FEDERALLY OWNED COAL

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mined by the Secretary, of the coal subject to the lease. * * *

If the price of surface owner consent remains unlimited and the Government makes no effort to receive fair payment for its coal, the cost of obtaining consent can easily reduce the amount which lessees are able and willing to pay to the Government for the opportunity to recover the coal. If the cost of consent is sufficiently large, bids submitted for Federal coal leases arguably would not provide the fair return which Congress intended to flow to the public from the development of the coal. (See 123 Cong. Rec. S 8009 (daily ed. May 19, 1977)). Reading sec. 714(c) of SMCRA in connection with sec. 2 (a) of the Leasing Act, then, the question arises whether the Secretary may, in leasing Federal coal, calculate fair market value of that coal in such a way that the effect may be to limit the compensation paid to surface owners for consent.

Tentative Policy Preferences

On June 30, 1978, Secretary Andrus stated his preference that the Department limit payments to owners of surface overlying Federal coal if necessary to ensure that the public receives fair market value or to prevent the consent cost from raising coal prices to unreasonable levels. On Sept. 15, 1978, Under Secretary Joseph decided that, subject to my review, the preferred alternative for accomplishing this objective is to figure a pre-

set level for the consent compensation costs in the fair market value determination made in the leasing process. If an amount greater than the preset level is paid by a potential lessee to the surface owner, the potential lessee will be economically unable (unless he is willing to accept a return on investment lower than that assumed by the Department in computing fair market value, or is able to alter other costs or prices upon which the computation is based), to pay the minimum bonus bid which the Department is willing to accept to issue the lease. Thus, basing the minimum acceptable bonus bid partially on the assumption of limited payment for surface owner consent tends to limit the prices of surface owner consent lessees will be willing to pay.

Calculation of Fair Market Value

"Fair market value" is traditionally defined as "the amount in cash or on terms reasonably equivalent to cash, for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy." Interagency Land Acquisition Conference, *Uniform Appraisal Standards for Federal Land Acquisition* 3 (1973); 4 Nichols, *Eminent Domain* § 12.2[1] (3d ed. 1977).

It is worthwhile, at this point, to interject a brief description of the method by which the Department

determines the fair market value of leasable Federal coal.* The Geological Survey makes the initial determination of the coal resource economic value of a tract to be leased competitively. This estimate is submitted to the Bureau of Land Management which adds considerations such as alternative land uses and socioeconomic factors to arrive at the fair market value of the tract.

When possible, the Geological Survey uses a comparable sales approach to determine the mineral value of a tract. An estimate of value is made, according to this method, by comparing recent land transactions in the vicinity. Tracts are rated for comparability on the basis of location, time of the transaction, access to transportation facilities, highest and best use conditions and other physical and economic similarities and differences. Of course, the unavailability of adequate sales records or the absence of reasonably comparable transactions can render this approach useless.

If comparable sales data are unavailable, the Survey uses an income approach with discounted cash flow analysis. This method involves the calculation of annual revenues and costs resulting from development of the mineral resource. Annual revenue is figured by applying the market price of coal at the point of shipment to the volume of production scheduled for each year.

*This description of the Department's procedures is derived mainly from the Tract Evaluation Issue Paper prepared by GS-BLM Task Force 155 for the Office of Coal Leasing (May 1978).

After expected capital and operating costs are deducted, the resulting cash flow is discounted over time using an established discount rate to compute the net present value of the resource.

Relationship Between Fair Market Value and Surface Owner Consent Cost

In computing the fair market value of the coal subject to the lease, all costs of the coal recovery process will be reflected. *See* 4 Nichols, *Eminent Domain* § 13.22[2] (3d ed. 1977); *293.080 Acres of Land v. United States*, 169 F. Supp. 305 (W.D. Pa. 1959); Louis, *Mineral Valuation* 6, 109-16 (1923). This includes the cost of obtaining surface owner consent. This might suggest that there is no inconsistency in allowing unlimited consent costs and recovering fair market value. This is valid, however, only to the extent that the price of surface owner consent covers damages to the surface estate and operation.

Payment of unlimited consent costs would be consistent with recovery of fair market value only if the statute referred to the fair market value of the *lease*, for acquisition of the lease would not equal acquisition of the right to mine the coal. As the cost of acquiring surface owner consent increased, the amount which a lessee would be willing to pay for the lease would go proportionately lower, and the fair market value of the lease would be less.

But the statute requires that the Secretary lease for the fair market

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value of the coal. This is the market value to the owner of the mineral in place, which differs from the market value of severed coal by the cost of recovering the coal. *State v. Nunes*, 233 Or. 547, 379 P. 2d 579 (1963). The recovery cost includes damage to the surface caused by mining. Of course, no part of the value of the coal in place should be deducted in computing the fair market value of that coal to its owner, the public. Yet, that is exactly what could occur were the surface owner in a position to exact a consent payment based on the value of the coal itself—a payment in excess of losses and costs to the surface estate and operation—and this entire payment were included in the value computation.

Assuming a limited consent cost figure in the fair market value calculation would ensure that no lease is issued in which the return to the public is less than the fair market value of the severed coal less all legitimate recovery costs; payment for the value of the coal in place is not a legitimate recovery cost.

Assigning a value to the surface estate which excludes value attributable to the presence of underlying Federal coal is entirely consistent with existing law. The mineral estate and the surface estate have separately ascertainable market values. *Eagle Lake Improvement Co. v. United States*, 141 F. 2d 562 (5th Cir. 1944); *United States v. 4,553 Acres of Land*, 208 F. Supp.

127 (N.D. Cal. 1962). It is natural and necessary that these distinct values be identified in order to ensure receipt of the full market value of the coal by the public. In determining the value of the surface, the calculation must be limited to its value for surface uses and must exclude elements of value attributable to minerals belonging to the United States, or other enhanced value created by the Government's need for the property. *Shoemaker v. United States*, 147 U.S. 282 (1893); *United States v. Miller*, 317 U.S. 369 (1943); *United States v. 158.76 Acres of Land*, 298 F. 2d 559 (2d Cir. 1962).

Secretarial Discretion and Regulatory Authority

The Secretary has broad discretion "to prescribe necessary and proper rules and regulations and to do any and all things necessary" to accomplish the purposes of the Mineral Lands Leasing Act. 30 U.S.C. § 189; *Udall v. Tallman*, 380 U.S. 1 (1965). One of the principal purposes of the Act, as amended by the 1976 coal leasing legislation, is to provide for a fair return to the public from Federal coal leasing. S. Rep. No. 296, 94th Cong., 1st Sess. 13 (1975); H.R. Rep. No. 681, 94th Cong., 1st Sess. 17-18 (1975); 121 Cong. Rec. S 14556 (daily ed. July 31, 1975). As shown by the above discussion of the interrelationship between surface owner consent prices and receipt of fair

market value, indirect limitation of surface owner consent prices is one of the steps necessary to ensure fair return on the public's coal.

In the exercise of his discretion to lease under the Mineral Lands Leasing Act, the Secretary is authorized to refuse to lease where such action would be contrary to the purposes of the Act, and, in fact, is required to refuse to lease where contrary to the statutory objective of receiving fair market value. 30 U.S.C. § 201 (a) (1) (1976). The exercise of Secretarial discretion to decline to lease when high surface owner consent prices have the effect of reducing the amount a potential lessee is willing to pay the government for the lease is, in effect, a decision that the United States is not a willing seller at the price offered. When this is the case—that is, when, for lack of a willing seller, fair market value has not been offered—there is no doubt that the decision not to lease is proper.

Legislative History of the Surface Owner Consent Provision

Only after days of floor debate and conference committee negotiations did Congress arrive at the final version of the surface owner consent provision of the Surface Mining Control and Reclamation Act. The history of the bill suggests that a fair market value calculation which could indirectly limit consent payments would be consistent with Congressional objectives.

The principal purposes of the surface owner consent provision are to ensure that the livelihood of resident ranchers and farmers is not

interrupted without their approval and to ensure that, when displaced, those surface owners do not suffer financially for the loss of the surface estate and surface operations. S. Rep. No. 128, 95th Cong., 1st Sess. 102(1977); 123 Cong. Rec. S 7999, S 8003, S8006, S 8008, S 12436, S 12440, H7598 (daily ed. May 19, July 20, 21, 1977). The idea that surface owners would be in a position to establish a price for consent based on the value of the coal underlying the surface was outrageous to Senators who opposed any consent provision not tied to a limit on compensation. 123 Cong. Rec. S 7999, S 12429 (daily ed. May 19, July 20, 1977) (remarks of Senators Johnston and Bumpers). The danger foreseen was that the surface owner could, in effect, assert through the consent provision an interest very much like a salable property interest in the mineral estate. This is an interest which the surface owner has never had in Federal coal and which Congress did not intend to transfer to the surface owner under sec. 714(g) of SMCRA:

Nothing in this section shall be construed as increasing or diminishing any property rights by the United States or by any other landowner.

Congress made it quite clear that the surface owner veto of surface mining is absolute—that no system for override of the veto was intended. 123 Cong. Rec. S 7999–8012, S 8123–30 (daily ed. May 19, 20, 1977); H.R. Rep. No. 493, 95th Cong., 1st Sess. 115 (1977). Since the principal alternatives considered in the 1977 congressional de-

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bates were limitation of consent prices through an override of non-consent (by lessees upon payment of damages into court) and the provision enacted which has no limitation, there was no discussion of possible indirect limitations which might result from policies under consideration by the Department. See 123 Cong. Rec. S 7997-8012, S 8123-30, H 7591 (daily ed. May 19, 20, July 21, 1977).

Despite the unwillingness of Congress to directly limit payments with an override of nonconsent, there is a clear indication in the Senate debates that Secretarial action to control consent prices would be appropriate in instances where a landowner attempts to "sell the coal," *i.e.*, demands a consent price based not on the value of the surface estate, but of the Federal mineral estate. The following exchange between Senator Ford, a proponent of either limited consent or an override of nonconsent, and Senator Melcher, a proponent of the measure that was enacted, concerns the possibility that a surface owner may demand a royalty interest in the coal in exchange for consent:

MR. FORD. If he has the privilege of denying or accepting the severance of the coal, would he not then have the right to say, "In lieu of so much per acre, I want 25 cents per ton royalty on the coal mined" or, "I want 50 cents per ton royalty"? Would he not have that privilege?

MR. MELCHER. I say, in answer to the question, that the bill does not preclude it; but the bill does not suggest it, nor

does the Mineral Leasing Act, under which the leases are let, suggest it.

I might add that it would be contrary to the public interest; and *I am certain that the Secretary, under no circumstances, would favor it and if he knew about it, would disallow it.*

However, if the Senator from Kentucky or any other Senator cares to stipulate in the bill that no surface owner may be recompensed on the basis of royalty, I would be delighted to support the amendment. It simply is not the practice and it is not done, nor was it envisioned to be done. But I have no objection to prohibiting it by an outright ban.

123 Cong. Rec. S 8128 (daily ed. May 20, 1977) (*italics added*).

This portion of the exchange shows that at least one strong proponent of the consent provision which emerged thought that the Secretary has independent authority to limit payment to the surface owner and that exercise of such authority would be consistent with the provision he was supporting.

Senator Melcher's views are consistent with the past practice of the Department in limiting prices in transactions involving minerals under Federal lease. The Secretary has previously issued regulations limiting the size of overriding royalties for oil and gas and for other leaseable minerals including coal. 43 CFR 3103.3-6, 3503.3-2(c).

The continuation of the above colloquy confirms our interpretation:

MR. FORD. The junior Senator from Kentucky is not a lawyer, but I would be hard pressed to think that the Secretary could disallow the agreement between the surface owner and mining company—if

we are saying that he has the right of turndown or acceptance. Would the Secretary have the right to disallow the arrangement whereby they could sever the coal based on a 25-cent or 50-cent per ton royalty?

MR. MELCHER. I think the marketplace has determined otherwise. It simply is not done. The Secretary, in allowing the lease to a coal company, is going to look, first of all, at whether there is written consent. *If he wishes to look into the circumstances as to how that written consent is arrived at, he certainly may—and in the public interest, probably would.*

123 Cong. Rec. S 8128 (daily ed. May 20, 1977) (italics added).

This exchange supports Secretarial action to control consent payments to surface owners. There is no discussion which indicates an intent to prevent the Secretary from controlling consent prices. I conclude, therefore, that the indirect limitation of surface owner consent prices—through assumption of a limited consent cost in the computation of the fair market value of the coal which must be bid before a lease can be issued—would be completely consistent with SMCRA.

"Those minerals * * * are the people's minerals." 123 Cong. Rec. S 8002 (daily ed. May 19, 1977) (remarks of Sen. Haskell). Prevention of unjust enrichment by Secretarial actions discouraging surface owners from pricing consent on the basis of the value of the publicly owned mineral estate was contemplated and suggested by Congress, as long as there is no interference with the surface owner's superior right to say "no." This last caveat prevents tying a limitation on consent prices to a nonconsent override, but does not

conflict with the proposal under consideration by the Department.

The Department's proposal accomplishes the congressional objective of avoiding consent payments based on the value of the Federal coal, while maintaining the integrity of the surface owner consent provision by preserving the ultimate right of the surface owner to veto strip mining on his land.

Timing of Consent Acquisition

Using appraised surface value rather than consent cost in the fair market value determination is the ordinary and might, in some situations, be the sole way to compute fair market value. The Senate Report on SMCRA, in discussing the surface owner consent provision, states: "It is anticipated that negotiations will take place after the bids are opened, but before the lease is issued by the Secretary." S. Rep. No. 128, 95th Cong., 1st Sess. 102 (1977).

Since the fair market value is calculated prior to the opening of bids in order to set the minimum acceptable bid, the actual consent price would be unavailable to the Department at the time of the calculation. It follows that, in the procedure contemplated by the Senate Committee, an amount other than actual consent cost must be used to find fair market value. The natural method of computing this alternative amount is appraisal of the surface estate, its likely damages and losses to the surface operation. Determination of the losses and costs to be incurred by the surface

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owner due to the mining operation is the economically sound method of assigning a value to the consent, and what we must conclude the Senate Committee had in mind in this scenario.

Contrary to the Senate Committee's expectation, the Department proposes in most cases to hold no lease sales unless consent has been given. Yet the preferred options identified by Under Secretary Joseph on Sept. 15, 1978, suggest that some lease sales will be held prior to acquisition of consent. When that sequence envisioned by the Senate Committee actually occurs, the Department must, in computing fair market value, assume a reasonable consent cost in place of actual price. If this were to occur in certain cases, while fair market value were calculated in other cases on the basis of actual consent prices which exceeded costs and losses to the surface estate and operation, the resulting variations in minimum acceptable bonus bids unrelated to variations in the value of the Federal coal would not only be inequitable, but clearly contrary to the statutory policy embodied in the fair market value requirement.

CONCLUSION

In conclusion, having examined both the coal leasing and surface mining laws, their legislative histories, and the policies behind them, I conclude that the Secretary may, to ensure a fair return to the public

from federally leased coal under privately owned surface, use, as the cost of surface owner consent, the amount of damages resulting from disruption of the surface estate or a similar figure rather than the actual payment which a surface owner has received or may receive for his consent.

I recognize that the surface estate may have values to the surface owner which cannot be measured by the economic computation of the Department. I hasten to add, therefore, that the limitation on the consent price which may result from this policy is only for the purpose of computing the minimum lease bid which the Department will accept so the public will receive a fair return from sale of the coal. Nothing in the approach being considered by the Department will force the surface owner to accept a payment below the value of the land to that owner, or will force a surface owner to give consent. The surface owner retains an absolute veto against leasing Federal coal underlying his surface, and the negotiation of the consent price will remain a matter between private parties; any amount may be paid so long as the Department receives the fair market value of the coal.

This opinion was prepared with the assistance of John D. Leshy, Associate Solicitor for Energy and Resources, Robert J. Uram, Assistant Solicitor for Onshore Minerals, Robert G. Berger and

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Branch of Onshore Minerals.

LEO M. KRULITZ,
Solicitor.

THUNDERBIRD COAL CORP.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCE- MENT

1 IBSMA 85

Decided *January 18, 1979*

Cross appeals by Thunderbird Coal Corp. and the Office of Surface Mining Reclamation and Enforcement from a Sept. 12, 1978 decision of Chief Administrative Law Judge Luoma, as to Docket No. NX-8-3-R, upholding in part a notice of violation of 30 CFR 715.17(a) issued in accordance with sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

Discharges from any portion of a permitted area that is disturbed in the course of the permittee's mining operations must comply with the effluent limitations contained in 30 CFR 715.17(a) of the Department's initial regulatory program.

2. Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Disturbed Areas: Sedimentation Ponds

A sedimentation pond is a "disturbed area," as that term is defined for the

purpose of 30 CFR 715.17(a) of the Department's initial regulatory program, when any portion of the permitted area which drains into the sedimentation pond has been disturbed by the permittee other than by the construction of other sedimentation ponds, roads, or diversion ditches.

APPEARANCES: J. T. Begley, Esq., and John P. Williams, Esq., for Office of Surface Mining Reclamation and Enforcement; Samuel E. Davies, Esq., for Thunderbird Coal Corp.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Cross appeals have been filed with the Board by the Office of Surface Mining Reclamation and Enforcement (OSM) and Thunderbird Coal Corp. (Thunderbird) from an administrative law judge's decision upholding in part a notice of violation issued to Thunderbird pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977.¹ The principal issue for decision by the Board is: When drainage *into* the final sedimentation pond in a permittee's water quality control system is both from areas that have been disturbed by the permittee and areas that have not been so disturbed, does sec. 715.17(a) of the Department's interim regulations require that the discharges *from* the sedimentation pond comply with the effluent limitations expressed therein? The administrative law judge held that

¹ See Act of Aug. 3, 1977, 91 Stat. 445, 505 and 30 U.S.C.A. § 1271(a)(3) (West Supp. 1978).

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Branch of Onshore Minerals.

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¹ See Act of Aug. 3, 1977, 91 Stat. 445, 505 and 30 U.S.C.A. § 1271(a)(3) (West Supp. 1978).

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only the percentage of discharges derived from disturbed areas must so comply. We hold that all discharges from such a sedimentation pond must comply with the effluent limitations expressed in sec. 715.17 (a). We therefore reverse.

Facts

The relevant facts in these appeals are not disputed by the parties. Thunderbird, a Kentucky corporation, conducts its surface coal mining operation under the authority of Permit No. 6414-77, issued by the Commonwealth of Kentucky. Much of the permitted area, comprising 100 acres, was previously mined for coal at least 15 to 20 years ago. The excavations thus created were not reclaimed and have resulted in highly acidic surface water drainage. Prior to the commencement of Thunderbird's current operation, the pH level of the drainage from the previously mined area was measured as 2.8 and 3.2 at two different sampling points.

When OSM issued its notice of violation to Thunderbird, the company had mined or otherwise directly disturbed approximately 26 acres of the permitted area. Before completing its operation, Thunderbird anticipates that it will have mined and reclaimed all but 10 to 12 acres of the permitted area. To control the quality of surface water drainage from its permitted area, Thunderbird devised a mining plan which includes the construction of four sedimentation ponds. When OSM issued its notice of violation,

one of these ponds (Structure No. 1) was completed, and a second pond (Structure No. 4) was completed except for the final emplacement of an emergency spillway (a temporary emergency spillway had been constructed). Structure No. 4 has the lowest topographical placement of the sedimentation ponds planned by Thunderbird; all surface water drainage from the permitted area passes through Structure No. 4.

On June 15, 1978, surface water drainage into Structure No. 4 comprised: (1) treated discharges from Structure No. 1 of drainage from areas disturbed by Thunderbird; (2) drainage from a small area (less than 1 acre) disturbed by Thunderbird which bypassed Structure No. 1; and (3) drainage from an area not yet disturbed by Thunderbird which also bypassed Structure No. 1. OSM's inspectors sampled the discharges from both Structure No. 1 and Structure No. 4, on the above date. The pH level of the sample from Structure No. 1 was found to be in compliance with the effluent limitation expressed in sec. 715.17 (a) of the Department's interim regulations; that from Structure No. 4 was found to be 4.5, which is not within the range of 6.0 to 9.0 specified as the pH level limitation in sec. 715.17(a).² On the basis of the pH level measured for discharges from Structure No. 4, OSM issued a notice of violation to Thunderbird, specifying a violation of sec. 715.17(a). Thunderbird was directed by OSM to treat the dis-

² See 42 FR 62685 (Dec. 13, 1977) (to be codified in 30 CFR 715.17(a)).

charges from Structure No. 4, in order to maintain the pH level of these between 6.0 and 9.0. Thunderbird was to submit a treatment plan for approval to the Commonwealth of Kentucky by June 29, 1978, and to implement an approved plan by July 27, 1978.

At the request of Thunderbird, an informal conference was held at its mine site on June 28, 1978. Because OSM did not alter its position as a result of this conference, Thunderbird sought further review of the notice of violation and was granted a hearing before an administrative law judge, held on July 20, 1978.³ The administrative law judge's decision of Sept. 12, 1978, affirmed the notice of violation "to the extent that it applies to the 5 percent of water coming from the disturbed area" which had not been treated in Structure No. 1, but found that "[the] Applicant is not responsible for the condition of water which flows from ***undisturbed land." Both Thunderbird and OSM made timely appeals to the Board from the decision rendered by the administrative law judge.⁴

Discussion

Sec. 715.17(a) of the Department's interim regulations, which controls the resolution of these ap-

³ This hearing was conducted pursuant to the authority expressed in 30 U.S.C.A. § 1275 (West Supp. 1978) and 43 FR 34393-4 (Aug. 3, 1978) (to be codified in 43 CFR 4.1160-4.1171).

⁴ See 43 FR 34398 (Aug. 3, 1978) (to be codified in 43 CFR 4.1271). OSM filed its notice of appeal with the Board on Oct. 10, 1978; Thunderbird filed its notice on Oct. 11, 1978.

peals, contains the following provisions:

All surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted, shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. Sedimentation ponds shall be retained until drainage from the disturbed area has met the water quality requirements of this section and the revegetation requirements of § 715.20 have been met. * * * For purpose of this section only, *disturbed area shall not include those areas in which only diversion ditches, sedimentation ponds, or roads are installed in accordance with this section and the upstream area is not otherwise disturbed by the permittee.* * * * Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations and, at a minimum, the following numerical effluent limitations [italics added]:

* * * * *

pH Within the range 6.0 to 9.0. [Taken from Table.]

* * * * *

(2) The permittee shall install, operate, and maintain adequate facilities to treat any water discharged from the disturbed area that violates applicable Federal or State laws or regulations or the limitations of paragraph (a).⁵

Thunderbird's position is premised on the fact that not all of the drainage impounded in Structure No. 4, on the date of OSM's inspection, derived from portions of the permitted area that had been disturbed by the company's mining operations. Thunderbird argues that the results of the tests performed by OSM on discharges from

⁵ 42 FR 62685 (Dec. 13, 1977) (to be codified in 30 CFR 715.17(a)).

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Structure No. 4 thus do not satisfy OSM's burden of proof in respect of the notice of violation.⁶ The administrative law judge agreed with the assertion that Thunderbird should not be held responsible for the quality of all drainage impounded in Structure No. 4; however, the judge determined that the notice of violation was validly issued as to that drainage which was shown to derive from an area disturbed by Thunderbird and which did not pass through and become treated at Structure No. 1. The judge did not specify the evidence upon which he relied to support his statement that the pH level of this particular drainage was shown to be in violation of the effluent limitation expressed in sec. 715.17(a). Moreover, the Board's review of the record has disclosed no such evidence. The Board does not agree with Thunderbird, however, that this lack of evidence is dispositive in these appeals. Instead, the Board has determined that, under the circumstances disclosed by OSM's inspection, all discharges from Structure No. 4 are subject to the pH level limitation expressed in sec. 715.17(a).

[1, 2] Sec. 715.17(a) requires that the quality of discharges from areas disturbed by a permittee must comply, at a minimum, with the effluent limitations expressed therein. The term "disturbed area" is defined, generally, to mean "those lands that

have been affected by surface coal mining and reclamation operations."⁷ This definition is qualified for the purpose of sec. 715.17(a), however, by the provision that "disturbed area shall not include those areas in which only diversion ditches, sedimentation ponds, or roads are installed in accordance with [sec. 715.17(a)] *and the upstream area is not otherwise disturbed by the permittee*" (italics added).⁸ The purpose of this qualification is clear. In its absence, diversion ditches, sedimentation ponds and roads would always constitute disturbances of a permitted area, and drainage in a permitted area which might contact any of these structure would be subject to the effluent limitations expressed in sec. 715.17(a). The Secretary has relieved a permittee from the obligation of maintaining the quality of such drainage, however, when (1) a diversion ditch, sedimentation pond, or road is installed in accordance with sec. 715.17(a), and (2) that portion of the permitted area which is upstream, in relation to any such structure, is not disturbed by the permittee other than to the extent necessary for the installation of the structure. This means, for example, that a permittee may construct a sedimentation pond in anticipation of mining coal on a portion of the permitted area which drains into the pond, without thereby becoming responsible for

⁶ OSM has the burden of establishing a prima facie case as to the validity of a notice of violation. See 43 FR 34394 (Aug. 3, 1978) (to be codified in 43 CFR 4.1171(a)).

⁷ 42 FR 62678 (Dec. 13, 1977) (to be codified in 30 CFR 710.5).

⁸ 42 FR 62685 (Dec. 13, 1977) (to be codified in 30 CFR 715.17(a)).

the quality of drainage that might pass through the pond before the mining operations proceed further. But, at such time as the operations of the permittee disturb any portion of the permitted area which drains into the sedimentation pond, other than as is necessary for the installation of other sedimentation ponds, roads, or diversion ditches, the permittee must assume responsibility for the quality of all discharges from that pond. This is because the sedimentation pond thereby becomes a "disturbed area," as that term is defined for the purpose of sec. 715.17(a).⁹

As was previously noted, the record reveals that Thunderbird has disturbed portions of the permitted area that drain into Structure No. 4, other than by the installation of sedimentation ponds, diversion ditches or roads.¹⁰ Thus, Structure No. 4 is, itself, a "disturbed area," and Thunderbird must maintain the pH level of discharges from this structure within the range 6.0 to 9.0. The company has not rebutted

OSM's assertion that, on June 15, 1978, the pH level of discharges from Structure No. 4 was 4.5, so the Board must conclude that the notice of violation was validly issued.

We hold that Thunderbird was responsible for the quality of discharges from Structure No. 4, under the circumstances disclosed by OSM's inspection and described above, rather than for only the quality of untreated drainage into Structure No. 4 from disturbed portions of the permitted area. The administrative law judge's decision is therefore reversed, and OSM is authorized to take further enforcement action consistent with this decision.

So ordered.

IRALINE G. BARNES,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

ADMINISTRATIVE JUDGE MIRKIN DISSENTING:

The majority has issued a finely reasoned, cogently stated opinion that informs the parties to the appeal why the case has been disposed of the way it has, and that advises future potential parties who are similarly situated the way similar appeals will be treated. The opinion is entirely consistent with both national and departmental goals concerning the environment.¹ The

⁹ One of the purposes of the Secretary's requirement that drainage from disturbed areas be passed through sedimentation ponds is to facilitate monitoring of mining operations. See Comment 8, 42 FR 62650 (Dec. 13, 1977). The Board's interpretation of sec. 715.17(a) is consistent with this purpose. In contrast, the interpretation of sec. 715.17(a) suggested by the administrative law judge would place on OSM the burden of monitoring drainage quality in the watershed area above a sedimentation pond, whenever the drainage into a sedimentation pond comprises drainage from both disturbed and undisturbed portions of the permitted area. Such a burden was clearly not intended by the Secretary to be imposed on OSM.

¹⁰ See *test, supra*, at p. 39; Transcript of the hearing before the administrative law judge on Sept. 12, 1978, at 121-122; Ex. 2.

¹ Secs. 101 and 102 of the Act, 91 Stat. 445, 447, 448; sec. 700.2 of the interim regulations, 42 FR 62675 (Dec. 13, 1977).

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problem before us, though, is whether those goals have been implemented in the manner asserted by the majority. I agree with much of what the majority has said. All that is required for my total agreement is a prodigious act of interpretation. I cannot perform that act.

For the purposes of this dissent, the important facts are that there were two sedimentation ponds (1 and 4), neither of which was in a site where actual excavation was taking place.² Surface water drainage from the disturbed area went into pond No. 1 and was treated so that the pH level was satisfactory. Water was then discharged from pond No. 1 which flowed into pond No. 4 where it comingled with drainage from a disturbed area (which drainage did not pass through pond No. 1) and drainage from an undisturbed area. Discharges from pond No. 4 had an unacceptably low pH level. No evidence was offered to demonstrate the pH level of either the untreated drainage from the disturbed area or the drainage from the undisturbed area before they entered pond No. 4. Nevertheless, the majority has held that the sedimentation pond itself constitutes a disturbed area. In effect, then, this means that for a sedimentation pond *not* to constitute a disturbed

area, it must exist alone or, at best, in anticipation of a surface mining disturbance that is to be commenced at a later date. The Department could have defined "disturbed area" to be so encompassing. The question then becomes whether there is any evidence that it did so.

Sec. 710.5 of the interim regulations defines "disturbed area" to mean "those lands that have been affected by surface coal mining and reclamation operations." Taken alone, this does not provide too much guidance. However, the "surface coal mining" referred to in sec. 710.5 is itself defined in sec. 700.5. That definition refers to a variety of excavation activities and, in addition to those activities,

adjacent land, the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to such activities.

42 FR 62677 (Dec. 13, 1977).

Immediately after this, "surface coal mining and reclamation operations" is defined as "mining operations and all activities necessary and incidental to the reclamation of such operations. * * *" Although

² Ex. 3 is a map that was relied upon by both parties. It delineates areas that were disturbed in the past, areas that have been or will be disturbed by Thunderbird, and undisturbed areas. All sedimentation ponds are shown to be in undisturbed areas—at least as that term is understood by the parties.

³ These definitions track the ones in sec. 701(27) and (28) of the Act, 91 Stat. 445, 518.

not specifically defined in the interim regulations, "resulting from or incident to" is defined in the proposed permanent regulations to mean "a relation between two events such that when one event occurs the other event will, in the natural sequence of events, also occur."⁴

The catalogue of adjacent land uses in section 700.5 which constitute surface coal mining operations is specific, not generic. "Sedimentation pond" is not in that number.

Indicative of the difficulties concerning what sedimentation ponds are to disturbed areas and *vice versa*, the Department felt it necessary to comment on this relationship when questions were raised during the comment period after the proposal of the interim regulations and before their adoption. In its brief to the Board, OSM presented the following history of sec. 715.17(a):

Section 715.17(a) in the *proposed* rules required the following:

"Discharges from the entire permit area must meet all applicable Federal and State water quality standards and the following numerical effluent limitations: * * *." (italics added) 42 Fed. Reg. 44,933 (1977).

This is in sharp contrast to the language of the final rules, which required the following.

"Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations, and, at a minimum, the following numerical effluent limitations: * * *." (italics added) 42 Fed. Reg. 62,685 (1977).

The reason behind the change in language was discussed in Comment No. 10 of the preamble to the final rules:

"In response to several comments, the regulations require application of the effluent limitations only to discharges from the disturbed area and not to discharges from areas the permittee has not disturbed through mining and reclamation * * *. Effluent limitations do not apply to discharges from undisturbed areas." 42 Fed. Reg. 62,651 (1977).⁵

The majority interpretation, nevertheless, by expanding the definition of disturbed areas, captures those activities which the Department indicated in comment 10 it was excluding from the substantive regulatory requirements of sec. 715.17(a). In the departmental analysis of the scope and meaning of sec. 816.42 of the proposed permanent regulations the Department also seems to be of the opinion that the regulation is not yet all inclusive. Sec. 816.42 is the analog of sec. 715.17(a) of the interim regulations. The Department reaffirms comment 10 previously cited, and goes on to say: "If necessary, however, the office will promulgate more stringent limitations and requirements in the future to protect water quality."⁶ The way to do this is by amendment of the rules, not by construction by this Board.

Indeed, the conduct amounting to the alleged violation could have been regulated in a number of ways not requiring this extreme interpretation of departmental regulations. Had the discharge from the untreated disturbed area been tested and found to be deficient, the results of that test could have been offered as evidence of the violation

⁵ Brief of OSM, Nov. 17, 1978, at pp. 6, 7.

⁶ 43 FR 41745, 41746 (Sept. 18, 1978).

⁴ Sec. 700.5, 43 FR 41801 (Sept. 18, 1978).

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charged by OSM. No such evidence was offered. Had the activity violated Kentucky law, as urged by OSM, at the hearing and in its brief, referral to the Kentucky authorities could have solved the problem. E.P.A. regulations were also asserted to forbid the comingling of satisfactory and unsatisfactory waters if the overall result is unsatisfactory.⁷ The matter could have been referred to E.P.A. for correction. All I am saying is that departmental regulations, as presently constituted, are not sufficiently broad to embrace the activity that is the subject of this appeal. As these are interim regulations and the Department is now in the process of promulgating permanent regulations, it has an ideal opportunity to state precisely the scope of its effort to regulate effluent discharges.

For these reasons, I would reverse as to OSM and grant the appeal of Thunderbird.

MELVIN J. MIRKIN,
Administrative Judge.

APPEAL OF STATE OF ALASKA

3 ANCAB 129

Decided *January 19, 1979*

Appeal of State of Alaska from the Bureau of Land Management Decision Nos. AA-6685-B, A-050463-C, etc.

Remanded to the Bureau of Land Management for action consistent with the decision.

⁷ 40 CFR Part 434.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Summary Dismissal

An issue in an appeal will be dismissed for lack of diligent prosecution when a party fails to respond to an Order of this Board requiring a showing of cause why an issue should not be dismissed.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

ANCAB is bound by statements of Secretarial policy contained in Secretarial Orders published in the *Federal Register*.

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

A timely appealed Bureau of Land Management decision does not constitute a final Departmental decision as that term is used in sentence 5, sec. 2 of S.O. 3029.

APPEARANCES: James N. Reeves, Esq., Assistant Attorney General and Shelley J. Higgins, Esq., Assistant Attorney General, on behalf of the State of Alaska; Bruce Schultheis, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; James D. Linxwiler, Esq., on behalf of Cook Inlet Region, Inc.; and Richard G. Encelewski, General Manager, Ninilchik Natives Association, Inc.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native

Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, and Part 4, Subpart J (1975), hereby makes the following findings, conclusions and decision.

On May 8, 1978, the State of Alaska filed a Notice of Appeal and Statement of Reasons for Appeal in the above-entitled case. The State of Alaska alleged that there were three issues subject to appeal. The first issue was that the Bureau of Land Management erred in its treatment of certain third-party interests held under A.S. 38.05.077, which are also known as "open-to-entry leases." The second issue concerned the Bureau of Land Management's failure to reserve an easement for a road which lies in the S $\frac{1}{2}$ N $\frac{1}{2}$ of sec. 29, T. 4 S., R. 14 W., Seward meridian. The third issue raised was that the Bureau of Land Management erred in approving for interim conveyance the E $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 34, T. 1 S., R. 14 W., Seward meridian, also known as the Ninilchik Highway Maintenance site, on the grounds that the State of Alaska holds title to said parcel.

On May 10, 1978, this Board ordered the segregation of all lands described by the State as being subject to dispute in this appeal.

On June 21, 1978, Cook Inlet Region, Inc. (CIRI) and Ninilchik Natives Association, Inc. (NNAI), replied to the State of Alaska's Statement of Reasons for Appeal. CIRI and NNAI requested that the

State's appeal regarding the open-to-entry leases be held in abeyance pending the reconsideration of Secretarial Order 3016 (Dec. 14, 1977, 85 I.D. 1 (1978)) which concerned Departmental treatment of the open-to-entry leases. They also stated that the issue of a road easement contained in para. 2 of the State's pleading should be remanded to the Bureau of Land Management with instructions to include it as an easement. As to the third issue involving the property more commonly known as the Ninilchik Highway Maintenance site, CIRI and NNAI requested that the State of Alaska submit evidence of its interests of whatever nature in such lands, and that the Board thereafter establish a briefing schedule on this issue.

The Bureau of Land Management also submitted an answer to the State of Alaska's Statement of Reasons for Appeal requesting the same relief as CIRI and NNAI except that the Bureau of Land Management requested that the question on the Ninilchik Highway Maintenance site be remanded to the Bureau of Land Management and the State be given 30 days in which to submit evidence of ownership of such site.

On July 12, 1978, this Board suspended all further briefing in this appeal with respect to the treatment of open-to-entry leases in said BLM decision pending the reconsideration of S.O. 3016. Since all parties had agreed to the reservation of an easement for the road which lies in the S $\frac{1}{2}$ N $\frac{1}{2}$ of sec. 29, T. 4 S., R

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14 W., the Board ordered that such be included by the Bureau of Land Management as an easement in the decision and interim conveyance. The Board also ordered the State of Alaska to submit to the Board, evidence of its interests of whatever nature in the E $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 34, T. 1 S., R. 14 W., Seward meridian, also known as the Ninilchik Highway Maintenance site.

On Aug. 14, 1978, the State of Alaska submitted a document entitled "Statement of Interest," together with various exhibits. The Statement of Interest alleged that the State of Alaska received a quitclaim deed dated June 30, 1959, to the Ninilchik Highway Maintenance site, pursuant to the Alaska Omnibus Act, P.L. 86-70 (June 25, 1959), 73 Stat. 141. The exhibits filed with this Statement include a quitclaim deed from the Secretary of Commerce, U.S. Department of Commerce, to the State of Alaska. This deed conveyed lands which were described in three different schedules, one of which was identified as Schedule C in the deed. Submitted along with the copy of the deed was a photocopy of one page of Schedule C which contained a description of air navigational site withdrawal # 138, which is located at Ninilchik, Alaska. Copies of several public land orders submitted by the State of Alaska show that the E $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 34, T. 1 S., R. 14 W., Seward meridian, the land here in dispute, was included within air navigational site withdrawal # 138.

In light of this documentation submitted by the State of Alaska purporting to show a conveyance to the State of the E $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 34, T. 1 S., R. 14 W., Seward meridian, this Board, on Aug. 25, 1978, ordered Cook Inlet Region, Inc., Ninilchik Natives Association, Inc., and the Bureau of Land Management to show cause why this land should not be excluded from the Bureau of Land Management decision to convey on the grounds that this land had been previously conveyed to the State of Alaska, and is not public land within the meaning of § 3(e) of ANCSA.

More than 30 days have elapsed and neither Cook Inlet Region, Inc., Ninilchik Natives Association, Inc., nor the Bureau of Land Management have shown cause why the E $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 34, T. 1 S., R. 14 W., Seward meridian, should not be excluded from the conveyance to the Ninilchik Natives Association, Inc. and Cook Inlet Region, Inc.

[1] An issue in an appeal will be dismissed for lack of diligent prosecution when a party fails to respond to an Order of this Board requiring a showing of cause why an issue should not be dismissed.

The State of Alaska having submitted documentation which indicates that they are the fee title holders of the Ninilchik Highway Maintenance site, and Ninilchik Natives Association, Inc., Cook Inlet Region, Inc., and the Bureau of Land Management having failed

to respond to this Board's Order to Show Cause why the Ninilchik Highway Maintenance site should not be excluded from the above-referenced decision to convey on the grounds that this land has been previously conveyed to the State of Alaska and is therefore not public land within the meaning of § 3(e) of ANCSA and not available for conveyance to the Ninilchik Natives Association, Inc., pursuant to ANCSA, this Board Orders that this question be dismissed as an issue in this appeal. This Board further Orders that the E $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 34, T. 1 S., R. 14 W., Seward meridian, more commonly known as Ninilchik Highway Maintenance site, shall be excluded from the above-referenced decision to convey.

The only issue remaining in this appeal is the allegation that the Bureau of Land Management erred in its treatment of third-party leases held under A.S. 38.05.077 when it made the conveyance subject to these leases rather than excluding the leases from the conveyance. This very issue was addressed by the Secretary of the Interior on Nov. 27, 1978, when there was published in the *Federal Register* S.O. 3029 (43 FR 55287), the subject of which was "Valid Existing Rights Under the Alaska Native Claims Settlement Act (ANCSA)." This Secretarial Order No. 3029 became effective immediately, canceling previously issued S.O. 3016 which concerned the same subject S.O. 3029 stated in part as follows:

* * * * *

Sec. 2 *Policy*. By this Order I hereby adopt the Memorandum from the Solicitor, dated Oct. 24, 1978, (copy attached), as the position of the Department on the subject of valid existing rights under ANCSA. I reaffirm my conclusion in Order 3016 that, if prior to the passage of ANCSA, lands which were tentatively approved for selection by the State of Alaska were (a) tentatively approved or patented by the State to municipalities or boroughs; or (b) patented or leased by the State with an option to buy under Alaska Statute [sic] 38.05.077 (the so-called 'open-to-entry' program); then valid existing rights were created within the meaning of ANCSA. I also now conclude that lands covered by such open-to-entry leases from the State should not be included in conveyances to Native corporations. The Bureau of Land Management should identify third party interests created by the State, as reflected by the land record of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department should not adjudicate these interests. This Order is not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official. The question of retroactive application of this Order shall be addressed by the Solicitor under procedures which shall be announced by him within 30 days of this Order's effective date.

* * * * *

On Dec. 4, 1978, this Board ended the suspension of action on this issue in this appeal and directed the parties to file within 30 days from receipt of the Order, briefing on this Secretarial Order. More than 30 days have elapsed since receipt of this Order by all parties to this appeal and no briefing has been filed.

[2] The Board has previously held that it is bound by the rules

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and regulations promulgated by the Secretary of the Interior under ANCSA. (*Appeal of Eyak Corp.*, 1 ANCAB 132, 83 I.D. 484 (1976).) The Board has also held that it is bound by Secretarial findings, conclusions, and statements of Departmental policy where the Secretary, pursuant to regulation, takes original jurisdiction of a case and renders a final decision. (*Appeal of Clifford C. Burglin*, 2 ANCAB 134 (Aug. 5, 1977); *Appeal of Clifford C. Burglin* (On Reconsideration), 3 ANCAB 37 (July 3, 1978).) Likewise, the Board is bound by statements of Secretarial policy contained in Secretarial Orders published in the *Federal Register*.

[3] One of the statements of policy in S.O. 3029 is that such Order was not intended to disturb any final Departmental decision previously rendered. In the present case, the Bureau of Land Management rendered a decision on the selection application of Ninilchik and this was timely appealed to this Board. Pursuant to 43 CFR Part 4, Subpart A, § 4.1(5) and 43 CFR Part 4, Subpart J, § 4.901(a), this Board decides finally for the Secretary, appeals under ANCSA. This Board, having not rendered a final decision on the issue of treatment of the open-to-entry leases involved in this appeal prior to the issuance of S.O. 3029, now finds that there has been no final administrative determination of the third-party interests here under appeal as mentioned in the fifth sentence of sec. 2 of S.O. 3029 that would preempt the

Secretarial policy set forth in sec. 2 of S.O. 3029.

The decision from which this appeal was filed identified certain third-party interests created by the State pursuant to A.S. 38.05.077 on land which formerly had tentative approval for selection by the State but which was determined by the Bureau of Land Management to be properly selected by Ninilchik Natives Association, Inc., under ANCSA. The BLM decision did not adjudicate such third-party interests but identified and treated them as follows:

* * * * *

The grant of lands shall be subject to:

* * * * *

5. The following third-party interests, if valid, created and identified by the State of Alaska, as provided by sec. 14 (g) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 704; 43 U.S.C. 1601, 1613 (g) (Supp. V, 1975)):

a. Open-to-entry leases, including the right of the lessee to exercise the option to purchase the surface estate at a negotiated price under the provisions of A.S. 38.05.77 [sic]:

1. ADL 41028 located in the NW¼ NE¼ of sec. 30, T. 2 S., R. 12 W., Seward Meridian.

2. ADL 41072 located in the NW¼ SW¼ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

3. ADL 41073 located in the NW¼ SW¼ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

4. ADL 41074 located in the NW¼ SW¼ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

5. ADL 41140 located in the NE¼ SW¼ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

6. ADL 41146 located in the NW $\frac{1}{4}$ of sec. 30, T. 2 S., R. 12 W., Seward Meridian.

7. ADL 44803 located in the SW $\frac{1}{4}$ of sec. 24, T. 2 S., R. 13 W., Seward Meridian.

8. ADL 47755 located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

9. ADL 49086 located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 19, T. 2 S., R. 12 W., Seward Meridian.

10. ADL 52829 located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

11. ADL 53837 located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

12. ADL 53838 located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 20, T. 2 S., R. 13 W., Seward Meridian.

13. ADL 55257 located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

14. ADL 56083 located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 19 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 30, T. 2 S., R. 12 W., Seward Meridian.

* * * * *

The record before this Board indicates that the language of all of the above open-to-entry leases states that they were entered into prior to Dec. 18, 1971, the date of passage of ANCSA.

Pursuant to the policy of the Department of the Interior as set forth in S.O. 3029 and the Memorandum of the Solicitor adopted by S.O. 3029 as the policy of the Department, this Board finds that the above-mentioned open-to-entry leases identified in the Bureau

of Land Management decision here under appeal, must be excluded from the conveyance to Ninilchik Natives Association, Inc.

Based upon the above, this appeal is hereby remanded to the Bureau of Land Management, and the Bureau of Land Management is Ordered as follows:

1. To exclude from the conveyance to Ninilchik Natives Association, Inc., those open-to-entry leases identified in the decision to convey;

2. To exclude from the conveyance to Ninilchik Natives Association, Inc., the E $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 34, T. 1 S., R. 14 W., Seward meridian, also known as the Ninilchik Highway Maintenance site;

3. To include in the conveyance to Ninilchik Natives Association, Inc., an easement for a road which lies in the S $\frac{1}{2}$ N $\frac{1}{2}$ of sec. 29, T. 4 S., R. 14 W., Seward meridian, which is in existence and which provides access to lands patented to the State of Alaska.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
*Chairperson, Alaska Native
Claims Appeal Board.*

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

January 16, 1979

**HARVEY SHEEHAN
AND
HAZEL HOLLAND MUDON***

39 IBLA 56

Decided January 16, 1979

Appeal from decision of the South Dakota Area Office, Bureau of Land Management, apportioning lands between grazing lease applicants, MT 020-78-2.

Reversed and remanded.

1. Grazing Leases: Generally—Grazing Leases: Apportionment of Land

An area manager's decision apportioning lands between two grazing lease applicants ordinarily will not be disturbed where both applicants have equal preference rights, the apportionment is consistent with the regulatory criteria of 43 CFR 4121.2-1(d) (2), and the decision is not shown to be arbitrary or capricious. However, where a new statute, sec. 402 of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1752(c) (West Supp. 1978), dictates that in certain circumstances "the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease," the apportionment must be conformed therewith.

2. Grazing Leases: Generally—Grazing Leases: Apportionment of Land—Regulations: Generally—Regulations: Interpretation—Regulations: Validity

In view of 43 U.S.C.A. § 1752(c) (West Supp. 1978), which dictates that in certain circumstances the present grazing user shall have a right of first refusal for any new lease, 43 CFR 4110.5 (43 FR 29070, July 5, 1978), must be read *in pari materia* therewith and with 43

CFR 4130.2(e) (43 FR 29072) to be construed as a valid regulation and must be interpreted not to apply were the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria.

APPEARANCES: Charles M. Thompson, Esq., May, Adam, Gerdes & Thompson, Pierre, South Dakota, for appellant Harvey D. Sheehan; and William J. Srstka, Jr., Esq., Duncan, Olinger, Srstka, Maher, & Lovald, P. C., for appellant Hazel Holland Mudon.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

Hazel Holland Mudon and Harvey Sheehan each separately appeal from a decision of the South Dakota Area Manager, Bureau of Land Management (BLM), dated May 24, 1978, by which an apportionment of land was made between two grazing lease applicants (appellants herein) for the same lands within the South Dakota Resource Area (MT-020-78-2). The lands in issue, located in Stanley County, South Dakota, contain 280 acres and are described as follows: T. 7 N., R. 29 E., sec. 27, SW ¼, W ½ SE¼, SE ¼ SE ¼, Black Hills guide meridian. Sheehan who, together with his predecessors in interest, had leased this land since 1960, filed application to renew his lease on Mar. 24, 1978. Mudon's grazing lease application for the same land had been filed on Feb. 13, 1978.

*Not in Chronological Order.

In his decision the area manager stated that: a field inspection was held on May 22, 1978; both applicants were qualified property owners and livestock operators; both had a need for livestock forage; both had an historical use of the area; the topography was quite rough with sharp draws and narrow-topped ridges; the Mudon ranch would benefit from the use of the area for livestock movement east to west; and a county road allowed public access to the lands. The area manager divided the land between the two applicants as follows: Hazel Mudon was awarded the W $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 27 for a total of 120 acres. Harvey Sheehan was awarded the SW $\frac{1}{4}$ sec. 27 for a total of 160 acres. The division was made subject to the following conditions:

1. The fence on the northeast side of the public lands * * * will be relocated to the new location * * * by Hazel Mudon.
2. All fence materials not used will be stockpiled beside the county road in the SW $\frac{1}{4}$ SE $\frac{1}{4}$.
3. The location of the new fence will be as near as practicable to the $\frac{1}{4}$ line in the S. $\frac{1}{2}$ of sec. 27.
4. This fencing will be completed by Sept. 30, 1978.

In his statement of reasons Sheehan asserts that the division is unfair because the fence was constructed and paid for by the Sheehans; that Mudon has used the land for grazing gratis for many years, and that Sheehan has leased the land for many years.

Mudon asserts in her statement of reasons that the land was leased by her predecessors in interest in 1948,

that this lease was terminated in 1956, when the U.S. Corps of Engineers took the land for the Oahe Dam pursuant to PLO 1312 (July 6, 1956). She points out that she applied for, but did not obtain, a lease to the land in 1968. She further states that she owns land on either side of the land in question and that loss of part of the land would divide and cripple her ranch. She asserts that there is a dam upon the land in question which was built by her predecessors in interest and that due to the Sheehan lease she has been deprived of use of this dam.

Sheehan denies that the dam on the property was built by Mudon's predecessors in interest.

The file contains two memoranda by the area manager, dated June 26 and July 14, 1978, which comment upon several of the points raised by the appellants and amplify the decision appealed from. The area manager points out that:

- a) Mudon's predecessors in interest had a lease on the subject land from Apr. 6, 1948 to Apr. 5, 1958;
- b) the fence, which was not authorized by BLM, was constructed approximately 1961, when Sheehan held a lease on the land;
- c) the dam was not authorized and did not enter into the decision appealed from;
- d) the NE $\frac{1}{4}$ SE $\frac{1}{4}$ was withdrawn for Oahe reservoir by public land order 1312 between Apr. 6, 1953 and Oct. 11, 1960, when the land was unleased.

The June 26, 1978, memorandum concludes as follows:

Since 1962 W. K. Holland and Hazel Mudon have tried to regain the public lands leased in their 4/6/48 lease. This

January 16, 1979

has caused hard feelings and considerable time and effort to be spent by all parties concerned. As both applicants have the same preference rights, the decision to split this area was based on the general needs of both applicants, and on the topography of the area. They both use the lands for grazing livestock and have need of the forage produced on the public land. The topography is rough breaks and the ridges run north to south. This decision would allow Mudon livestock easier movement along the Oahe reservoir shoreline.

On Oct. 6, 1978, the Board issued an order affording the appellants an opportunity to make additional showings in response to June 26 and July 14 memoranda. Counsel for appellant Mudon has submitted a newspaper clipping from the *Daily Capital Journal*, Pierre, South Dakota, dated Aug. 18, 1978. The article states that on Aug. 11, 1978, "Title to approximately 34,000 acres of land * * * was transferred from Harvey Sheehan to Lowell Light and Associates of Wheeling, Illinois for \$4,565,000." No additional submissions have been received from appellant Sheehan.

[1] The decision appealed from was based on 43 CFR 4121.2-1(d) (2), which states the criteria for determining the apportionment of lands between conflicting applicants for grazing leases:

The Authorized Officer will allocate the use of the public land on the basis of any or all of the following factors: (i) Historical use, (ii) proper range management and use of water for livestock, (iii) proper use of the preference lands, (iv) general needs of the applicants, (v) topography, (vi) public ingress and egress across preference lands to public lands

under application * * * (where access is not presently available), and (vii) other land use requirements. [Footnote omitted.]

Cf. 43 CFR 4110.5 (43 FR 29070 of July 5, 1978). The area manager considered several of these elements and the allegations presented on appeal fail to show how his apportionment of the land, including the stipulations, was either arbitrary or inequitable to either appellant. Nor has Mudon, to whom the fencing requirement applies, objected to that aspect of the decision. Since no convincing reason to disturb the area manager's decision has been offered, ordinarily the decision would be sustained. *John Ratray*, 36 IBLA 282 (1978); *Wesley Leininger*, 28 IBLA 93 (1976). *Cf.* 43 CFR 4.478(b).

[2] However, sec. 402(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), Oct. 21, 1976, 90 Stat. 2773, 43 U.S.C.A. § 1752(c) (West Supp. 1978), dictates that in certain circumstances "the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease." The record does not reveal that Sheehan fails to satisfy any of the statutory conditions precedent for that preference. H.R. Rept. No. 94-1163 buttresses our conclusion as to the meaning of the statute by reciting that:

Subsection (c) specifies that upon expiration of a least [*sic*] or permit existing users would have a right of first refusal for any new lease or permit, provided that grazing will be continued by

the Secretary concerned and they are in good standing and accept the terms and conditions of the new lease or permit.

But 43 CFR 4110.5 (43 FR 29070)¹ provides as follows:

4110.5 Conflicting applications.

When more than one qualified applicant applies for livestock grazing use of the same public land and/or where additional forage or additional land acreage becomes available, the authorized officer may allocate grazing use of such land or forage consistent with the land use plans on the basis of any of the following factors:

(a) Historical use of the public land (see § 4130.2(d));

(b) Proper range management and use of water for livestock;

(c) General needs of the applicants' livestock operations;

(d) Public ingress and egress across privately owned or controlled land to public lands;

(e) Topography;

(f) Other land use requirements unique to the situation. [Italics supplied.]

In the case at bar, Sheehan as the holder of the present lease, has a right of first refusal if he otherwise meets the other statutory criteria. The regulation, 43 CFR 4110.5 (43 FR 29070), must be read *in pari materia* with 4130.2(e) (43 FR 29072), which states:

(e) Permittees or lessees holding expiring grazing permits or leases shall be given first priority for receipt of new permits or leases if:

(1) The lands remain available for

livestock grazing in accordance with land use plans (see subpart 4120);

(2) The permittee or lessee is in compliance with the regulations contained in this part and the terms and conditions of his grazing permit or lease; and

(3) The permittee or lessee accepts the terms and conditions to be included in the new permit or lease by the authorized officer.

The apparent fact that there may now be a successor to appellant Sheehan's interest is beyond the ambit of this decision; we hold only that the decision appealed does not comport with the statutory criteria of FLPMA and with 43 CFR 4130.2(e) (43 FR 29072). The qualifications of Sheehan's successors as grazing lease applicants are a matter for BLM's original jurisdiction.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded for appropriate action consistent with 43 CFR 4130.2(e) (43 FR 29072).

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

JAMES L. BURSKI,
Administrative Judge.

¹ This appears in the *Federal Register* of July 5, 1978.

January 31, 1979

APPEAL OF RICHARD R. ROBINSON*

3 ANCAR 140

Decided January 31, 1979

Decision of the Alaska State Office, Bureau of Land Management AA-6685-B, 43 FR 14545 (1978) reversed in part.

1. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Pursuant to the policy of the Department of the Interior as set forth in Secretarial Order 3029 (43 FR 55287 (1978)), open-to-entry leases issued prior to the passage of ANCSA must be excluded from lands conveyed to village corporations pursuant to the Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 688; 43 U.S.C. §§ 1601-1611 (Supp. V, 1975).

APPEARANCES: Richard R. Robinson, pro se; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY

ALASKA NATIVE CLAIMS APPEAL BOARD

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976), and the implementing regulations in 43

CFR Part 2650, *as amended*, 41 FR 14737 (1976) and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650, *as amended*, and Part 4, Subpart J, the State Director is an officer of the United States Department of the Interior who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

DISCUSSION

Ninilchik Natives Association, Inc., filed selection application AA-6685-B, for the surface estate of lands located in the Ninilchik area, under § 12(a) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 701; 43 U.S.C. §§ 1601, 1611 (Supp. V, 1975)) (hereinafter ANCSA).

In the decision here appealed, the Alaska State Office, Bureau of Land Management (BLM) approved conveyance of approximately 70,659 acres of the selected land to Ninilchik Natives Association, Inc. This included approximately 68,000 acres properly selected by and tentatively approved in part to the State of Alaska under the Alaska Statehood Act of July 7, 1958 (72 Stat. 339-340; 48 U.S.C. Ch. 2, Sec. 6 (b) (1970)) (hereinafter the Statehood Act). The tentative approval previously granted to the State of

*Not in Chronological Order.

Alaska was rescinded, and the State's selection applications were rejected, because § 11 (a) (2) of ANCSA withdrew, subject to valid existing rights, such tentatively approved lands within the townships withdrawn by § 11 (a) (1) for selection by the Native village corporation.

During the period between tentative approval of the State's land selections under the Statehood Act and enactment of ANCSA, the State created certain third-party interests in the lands to which it had received tentative approval. These interests included "open-to-entry" leases, granted under a program which permitted leasing of recreational lands for specified terms, and eventual purchase of the surface estate in such lands at a negotiated price under the provisions of State law. (A.S. 38.05.077).

The appellant holds a State Patent, No. 3423, described on its face as follows:

Alaska State Land Survey No. 75-138, located within Section 20, Township 2, South, Range 12 West, Seward Meridian, containing 5.00 acres, more or less, according to the survey plat recorded in the Homer Recording Office on Apr. 29, 1977 as Plat No. 77-30.

The patent was executed by the Director of the Division of Lands and Water Management, Department of Natural Resources, State of Alaska, on Oct. 13, 1977.

Appellant received his patent through the open-to-entry leasing program. According to appellant's statement in his notice of appeal, uncontradicted on the record, his

father, William C. Robinson, originally staked the land as an open-to-entry lease (ADL 41074) on Oct. 23, 1968 and gave the lease to the appellant on Nov. 16, 1973. Appellant then had the land surveyed in 1976 and, upon approval of the survey, received the patent.

The decision appealed from states:

* * * * *

The grant of lands shall be subject to:

* * * * *

5. The following third-party interests, if valid, created and identified by the State of Alaska, as provided by section 14(g) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 704; 43 U.S.C. 1601, 1613(g) (Supp. V, 1975)):

a. Open-to-entry leases, including the right of the lessee to exercise the option to purchase the surface estate at a negotiated price under the provisions of A.S. 38.05.77 [sic]:

* * * * *

4. ADL 41074 located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of section 20, T. 2 S., R. 12 W., Seward Meridian.

* * * * *

Appellant protests conveyance of the land comprising his open-to-entry lease and, presently his patent, to Ninilchik Natives Association, Inc., subject to the lease; he seeks to have the leased and patented land specifically excluded from the conveyance.

Departmental policy on third-party interests as valid existing rights was the subject of a Secretarial Order 3016 dated Dec. 14, 1977. The Order stated in pertinent part:

Sec. 1 Purpose. The purpose of this Order is to resolve for the future certain

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specific questions which have arisen in the implementation of that Act.

Sec. 2 *Policy*. By this Order I hereby adopt the memorandum from the Solicitor dated Nov. 28, 1977 (copy attached), as the position of the Department on the subject of valid existing rights under the Alaska Native Claims Settlement Act. I conclude that if prior to the passage of the Alaska Native Claims Settlement Act (ANCSA) lands which were tentatively approved for state selection were conveyed by the State of Alaska to municipalities or boroughs, leased by the State with an option to buy under Alaska Stat. § 38.05.077, or patented by the State under Alaska Stat. § 38.05.077, valid existing rights were created within the meaning of ANCSA. *I also conclude that land covered by such a lease from the State should be included in any conveyance to a Native corporation, but the option to buy will be enforceable by the lessee against the Native corporation. The Bureau of Land Management should identify any third party interests created by the State, as reflected by the land records of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department should not adjudicate these interests.* This Order is not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official. (Italics added.)

However, at the time this appeal was filed, the Secretary was in the process of reconsidering the above-quoted Secretarial Order and had solicited briefs and memoranda from numerous interested parties for review and consideration.

On Nov. 20, 1978, the Secretary of the Interior issued Secretarial Order 3029, which canceled and

replaced Secretarial Order 3016 as a statement of Departmental policy on valid existing rights under ANCSA. (43 FR 55287 (1978)).

Secretarial Order 3029; in sec. 2 states:

* * * * *

Sec. 2 *Policy*. By this Order I hereby adopt the Memorandum from the Solicitor, dated Oct. 24, 1978, (copy attached), as the position of the Department on the subject of valid existing rights under ANCSA. I reaffirm my conclusion in Order 3016 that, if prior to the passage of ANCSA, lands which were tentatively approved for selection by the State of Alaska were (a) tentatively approved or patented by the State to municipalities or boroughs; or (b) patented or leased by the State with an option to buy under Alaska Statute [sic] 38.05.077 (the so-called "open-to-entry" program); then valid existing rights were created within the meaning of ANCSA. *I also now conclude that lands covered by such open-to-entry leases from the State should not be included in conveyances to Native corporations. The Bureau of Land Management should identify third party interests created by the State, as reflected by the land record of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department should not adjudicate these interests.* * * *

(Italics added.)

The Solicitor's Memorandum of Oct. 24, 1978, referenced by the Secretary, finds that protection for third-party interests created by the State is provided by ANCSA without reference to common law principles. The Solicitor in discussing the definition of "valid existing rights" quotes § 14(g) and § 22(b) of ANCSA, as well as regulations

contained in 43 CFR 2650.3-1(a) as follows:

Sec. 14(g) provides in pertinent part:

Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under sec. 6(g) of the Alaska Statehood Act) has been issued * * * the patent shall contain provisions making it subject to the lease contract (etc.) * * *.

Sec. 22(b) directs the Secretary "to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites or small tract sites, and who have fulfilled all the requirements of law prerequisite to obtaining a patent."

43 CFR 2650.3-1(a) :

Pursuant to secs. 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under sec. 6(g) of the Alaska Statehood Act), contracts, permits rights-or-way [sic], or easements.

The Solicitor notes "this regulation makes a basic distinction between rights 'leading to acquisition of title' and 'rights of a temporary nature.' The former are excluded from the conveyance, the latter are included but protected for the duration of the interest."

The Solicitor concludes that Departmental regulations have construed valid existing rights under ANCSA to include rights perfected

or maintained under State as well as Federal laws leading to the acquisition of title, noting that third-party interests created by the State can be considered to have been created "under" the Statehood Act, which is a Federal Statute. The Solicitor's memorandum further contains the following discussion of open-to-entry leases:

* * * * *

b. *Open-to-Entry Leases.*

The issue of whether or not "open-to-entry" leases are valid existing rights and how they should be processed by the BLM has also been raised.

The State "open-to-entry" leasing program, A.S. 38.05.077, provides for the issuance to qualified applicants a five-year lease (renewable for five years) to not more than five acres of State land classified as "open-to-entry."

It further provides:

"(4) Before a person may purchase the parcel of land upon which he has entered he shall have a survey made of the entry * * *.

* * * * *

"(6) When the entry has been made upon land that has been selected by the State and upon which the State has not received tentative approval or patent, the entry shall be approved only on the basis of a renewable lease. When tentative approval or patent has been received by the State, the lessee may relinquish his lease and acquire patent to the entry by negotiated purchase upon the terms and conditions provided for in this section."

The program contemplated here is a lease with an option to buy at a negotiated price. It is a lease which could at the election of the lessee lead to the acquisition of title.

Under the analysis set forth above, third party interests created by the State are protected regardless of whether they

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are of a temporary nature or lead to the acquisition of title. However, for the purposes of 43 CFR 2650.3-1(a), it must be determined whether land covered by an open-to-entry lease should be excluded from the conveyance, or whether it should be included in the conveyance which would be issued "subject to the lease."

After reviewing my original opinion on this issue, I have now concluded that lands subject to open-to-entry leases which were issued prior to Dec. 18, 1971, and which are within a Native selection should not be included in or counted against lands conveyed to Native corporations. Under this procedure the State continues to administer the program in accordance with its laws. If the lessee fails to exercise the option to purchase, the affected Native corporation can either have the land conveyed as part of its original entitlement or, if the entitlement is otherwise satisfied, then by exchange.

By excluding these lands from Native conveyances, this procedure will be in conformity with 43 CFR 2650.3-1(a), which provides for the exclusion from Native conveyances [of] entries which are being maintained in compliance with laws leading to the acquisition of title. Contrary to the conclusion which was drawn in my opinion of Nov. 28, 1977, these open-to-entry leases are analogous to entries made under the Alaska homestead, trade and manufacturing site, homesite, and headquarters site laws which permit entrymen a certain period of time (usually five years) to perfect their notices of entry and thereby gain title to the land. * * * Because we are excluding from Native conveyances entries which have been noted on the public land records for homesteads, Native allotments, trade and manufacturing sites, and headquarters sites, but which have not been perfected, lands under open-to-entry leases which have been properly issued by the State should likewise be excluded from Native conveyances.

On Dec. 4, 1978, the Board directed the parties to file within 30 days from receipt of the order briefing on Secretarial Order 3029. More than 30 days have elapsed since receipt of this Order by all parties to the appeal and no briefing has been filed.

In a companion case, *Appeal of State of Alaska*, 3 ANCAB 129, 86 I.D. 45 (1979), the State appealed the inclusion by BLM of a number of open-to-entry leases in the conveyance of Ninilchik Natives Association, Inc. Included in these leases was ADL 41074, the subject of the present appeal, held by the appellant's father, William C. Robinson.

[1] In *Appeal of State of Alaska, supra*, the Board found that pursuant to the policy of the Department of the Interior as set forth in S.O. 3029 and the Memorandum of the Solicitor adopted by S.O. 3029 as the policy of the Department, open-to-entry leases issued prior to the passage of ANCSA must be excluded from lands conveyed to village corporations pursuant to the Settlement Act.

That ruling is dispositive of this appeal. The Board hereby reaffirms its ruling in *Appeal of State of Alaska, supra*, that appellant's open-to-entry lease, ADL 41074, must be excluded from the conveyance to Ninilchik Natives Association, Inc.

It is unnecessary to remand the appeal to BLM for further action because the remand covering the same lease was ordered in *Appeal of State of Alaska, supra*.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Chairperson, Alaska Native Claims Appeal Board.

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

APPEAL OF JAMES E. BEDELL*

3 ANCAB 153

Decided *January 31, 1979*

Decision of the Alaska State Office, Bureau of Land Management AA-6685-B, 43 FR 14545 (1978) reversed in part.

1. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Pursuant to the policy of the Department of the Interior as set forth in Secretarial Order 3029 (43 FR 55287 (1978)), open-to-entry leases issued prior to the passage of ANCSA must be excluded from lands conveyed to village corporations pursuant to the Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 688; 43 U.S.C. §§ 1601-1611 (Supp. V, 1975).

APPEARANCES: James E. Bedell, pro se; Bruce Schultheis, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

ALASKA NATIVE CLAIMS APPEAL BOARD

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, *as amended*, 41 FR 14737 (1976) and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650, *as amended*, and Part 4, Subpart J, the State Director is an officer of the United States Department of the Interior who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

DISCUSSION

Ninilchik Natives Association, Inc., filed selection application AA-6685-B, for the surface estate of lands located in the Ninilchik area, under § 12(a) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 701; 43 U.S.C. §§ 1601-1611 (Supp. V, 1975)) (hereinafter ANCSA).

In the decision here appealed, the Alaska State Office, Bureau of Land Management (BLM) approved conveyance of approximately 70,659 acres of the selected land to Ninil-

*Not in Chronological Order.

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chik Natives Association, Inc. This included approximately 68,000 acres properly selected by and tentatively approved in part to the State of Alaska under the Alaska Statehood Act of July 7, 1958 (72 Stat. 339-340; 48 U.S.C. Ch. 2, Sec. 6(b) (1970)) (hereinafter the Statehood Act). The tentative approval previously granted to the State of Alaska was rescinded, and the State's selection applications were rejected, because § 11(a)(2) of ANCSA withdrew, subject to valid existing rights, such tentatively approved lands within the townships withdrawn by § 11(a)(1) for selection by the Native village corporation.

During the period between tentative approval of the State's land selections under the Statehood Act and enactment of ANCSA, the State created certain third-party interests in the lands to which it had received tentative approval. These interests included "open-to-entry" leases, granted under a program which permitted leasing of recreational lands for specified terms, and eventual purchase of the surface estate in such lands at a negotiated price under the provisions of State law. (A.S. 38.05.077)

The appellant is the holder of an "open-to-entry" lease, ADL 55257, on land located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 20, T. 2 S., R. 12 W., Seward meridian. The record indicates that the lease was issued on Aug. 13, 1971.

The decision appealed from states:

The grant of lands shall be subject to:

* * * * *

5. The following third-party interests, if valid, created and identified by the State of Alaska, as provided by section 14(g) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 704; 48 U.S.C. 1601, 1613(g) (Supp. V, 1975)):

a. Open-to-entry leases, including the right of the lessee to exercise the option to purchase the surface estate at a negotiated price under the provisions of A.S. 38.05.77 [sic]:

* * * * *

13. ADL 55257 located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

* * * * *

In the letter filed as his notice of appeal, appellant states: "I hold the O.T.E. Lease for ADL 55257 and have been faithfully [sic] keeping up with the requirements it entails. I intend to return to Alaska and follow my option to purchase the land before Aug. 1, 1981." This statement was filed May 19, 1978.

Departmental policy on third-party interests as valid existing rights was at that time the subject of a Secretarial Order 3016 dated Dec. 14, 1977. The Order stated in pertinent part:

Sec. 1 *Purpose*. The purpose of this Order is to resolve for the future certain specific questions which have arisen in the implementation of that Act.

Sec. 2 *Policy*. By this Order I hereby adopt the memorandum from the Solicitor dated Nov. 28, 1977 (copy attached), as the position of the Department on the subject of valid existing rights under

the Alaska Native Claims Settlement Act. I conclude that if prior to the passage of the Alaska Native Claims Settlement Act (ANCSA) lands which were tentatively approved for state selection were conveyed by the State of Alaska to municipalities or boroughs, leased by the State with an option to buy under Alaska Stat. § 38.05.077, or patented by the State under Alaska Stat. § 38.05.077, valid existing rights were created within the meaning of ANCSA. *I also conclude that land covered by such a lease from the State should be included in any conveyance to a Native corporation, but the option to buy will be enforceable by the lessee against the Native corporation. The Bureau of Land Management should identify any third party interests created by the State, as reflected by the land records of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department should not adjudicate these interests.* This Order is not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official. (Italics added.)

However, at the time this appeal was filed, the Secretary was in the process of reconsidering the above-quoted Secretarial Order and had solicited briefs and memoranda from numerous interested parties for review and consideration. Therefore, at the request of the Bureau of Land Management, the Board suspended action on this appeal pending reconsideration of Secretarial Order 3016.

On Nov. 20, 1978, the Secretary of the Interior issued Secretarial Order 3029, which canceled and replaced Secretarial Order 3016 as a statement of Departmental policy

on valid existing rights under ANCSA. (43 FR 55287 (1978))

Secretarial Order 3029, in sec. 2 states:

* * * * *

Sec. 2 *Policy.* By this Order I hereby adopt the Memorandum from the Solicitor, dated Oct. 24, 1978, (copy attached), as the position of the Department on the subject of valid existing rights under ANCSA. I reaffirm my conclusion in Order 3016 that, if prior to the passage of ANCSA, lands which were tentatively approved for selection by the State of Alaska were (a) tentatively approved or patented by the State to municipalities or boroughs; or (b) patented or leased by the State with an option to buy under Alaska Statute [sic] 38.05.077 (the so-called 'open-to-entry' program); then valid existing rights were created within the meaning of ANCSA. *I also now conclude that lands covered by such open-to-entry leases from the State should not be included in conveyances to Native corporations. The Bureau of Land Management should identify third party interests created by the State, as reflected by the land record of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department should not adjudicate these interests.* * * * (Italics added.)

The Solicitor's Memorandum of Oct. 24, 1978, referenced by the Secretary, finds that protection for third-party interests created by the State is provided by ANCSA without reference to common law principles. The Solicitor in discussing the definition of "valid existing rights" quotes § 14(g) and § 22(b) of ANCSA, as well as regulations contained in 43 CFR 2650.3-1(a) as follows:

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Sec. 14(g) provides in pertinent part:

Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under sec. 6(g) of the Alaska Statehood Act) has been issued * * * the patent shall contain provisions making it subject to the lease contract (etc.) * * *.

Sec. 22(b) directs the Secretary "to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites or small tract sites, and who have fulfilled all the requirements of law prerequisite to obtaining a patent."

43 CFR 2650.3-1(a):

Pursuant to secs. 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under sec. 6(g) of the Alaska Statehood Act), contracts, permits rights-of-way [sic], or easements.

The Solicitor notes "this regulation makes a basic distinction between rights 'leading to acquisition of title' and 'rights of a temporary nature.' The former are excluded from the conveyance, the latter are included but protected for the duration of the interest."

The Solicitor concludes that Departmental regulations have construed valid existing rights under ANCSA to include rights perfected

or maintained under State as well as Federal laws leading to the acquisition of title, noting that third-party interests created by the State can be considered to have been created "under" the Statehood Act, which is a Federal Statute. The Solicitor's memorandum further contains the following discussion of open-to-entry leases:

* * * * *

b. Open-to-entry Leases.

The issue of whether or not "open-to-entry" leases are valid existing rights and how they should be processed by the BLM has also been raised.

The State "open-to-entry" leasing program, A.S. 38.05.077, provides for the issuance to qualified applicants a five-year lease (renewable for five years) to not more than five acres of State land classified as "open-to-entry."

It further provides:

"(4) Before a person may purchase the parcel of land upon which he has entered he shall have a survey made of the entry * * *.

* * * * *

"(6) When the entry has been made upon land that has been selected by the State and upon which the State has not received tentative approval or patent, the entry shall be approved only on the basis of a renewable lease. When tentative approval or patent has been received by the State, the lessee may relinquish his lease and acquire patent to the entry by negotiated purchase upon the terms and conditions provided for in this section."

The program contemplated here is a lease with an option to buy at a negotiated price. It is a lease which could at the election of the lessee lead to the acquisition of title.

Under the analysis set forth above, third party interests created by the State are protected regardless of whether they

are of a temporary nature or lead to the acquisition of title. However, for the purposes of 43 CFR 2650.3-1(a), it must be determined whether land covered by an open-to-entry lease should be excluded from the conveyance, or whether it should be included in the conveyance which would be issued "subject to the lease."

After reviewing my original opinion on this issue, I have now concluded that lands subject to open-to-entry leases which were issued prior to Dec. 18, 1971, and which are within a Native selection should not be included in or counted against lands conveyed to Native corporations. Under this procedure the State continues to administer the program in accordance with its laws. If the lessee fails to exercise the option to purchase, the affected Native corporation can either have the land conveyed as part of its original entitlement or, if the entitlement is otherwise satisfied, then by exchange.

By excluding these lands from Native conveyances, this procedure will be in conformity with 43 CFR 2650.3-1(a), which provides for the exclusion from Native conveyances [of] entries which are being maintained in compliance with laws leading to the acquisition of title. Contrary to the conclusion which was drawn in my opinion of Nov. 28, 1977, these open-to-entry leases are analogous to entries made under the Alaska homestead, trade and manufacturing site, homesite, and headquarters site laws which permit entrymen a certain period of time (usually five years) to perfect their notices of entry and thereby gain title to the land. * * * Because we are excluding from Native conveyances entries which have been noted on the public land records for homesteads, Native allotments, trade and manufacturing sites, and headquarters sites, but which have not been perfected, lands under open-to-entry leases which have been properly issued by the State should likewise be excluded from Native conveyances.

On Dec. 4, 1978, the Board ended the suspension of action in this appeal and directed the parties to file within 30 days from receipt of the order briefing on Secretarial Order 3029. More than 30 days have elapsed since receipt of this Order by all parties to the appeal and no briefing has been filed.

In a companion case, *Appeal of State of Alaska*, 3 ANCAB 129 86I.D. 45 (1979), the State appealed the inclusion by BLM of a number of open-to-entry leases in the conveyance to Ninilchik Natives Association, Inc. Included in these leases was ADL 55257, the subject of the present appeal, held by Mr. James Bedell.

[1] In *Appeal of State of Alaska, supra*, the Board found that pursuant to the policy of the Department of the Interior as set forth in S.O. 3029 and the Memorandum of the Solicitor adopted by S.O. 3029 as the policy of the Department, open-to-entry leases issued prior to the passage of ANCSA, must be excluded from lands conveyed to village corporation's pursuant to the Settlement Act.

That ruling is dispositive of this appeal. The Board hereby reaffirms its ruling in *Appeal of State of Alaska, supra*, that appellant's open-to-entry lease, ADL 55257, must be excluded from the conveyance to Ninilchik Natives Association, Inc.

It is unnecessary to remand the appeal to BLM for further action because a remand covering the same lease was ordered in *Appeal of State of Alaska, supra*.

February 2, 1979

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
*Chairperson, Alaska Native
Claims Appeal Board.*

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

APPEAL OF WILLIAM P. BERGAN, INC.

IBCA-1130-11-76

Decided February 2, 1979

Contract No. CX-3000-5-9009, National Park Service

Appeal sustained in part.

1. Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Payments—Contracts: Disputes and Remedies: Damages: Measurement—Contracts: Disputes and Remedies: Equitable Adjustments

Where imponderables make it difficult to arrive at an accurate measurement of the amount of concrete placed under water, the Board finds that the amount represented by "paid for" concrete minus the amount of concrete admittedly wasted is the preferred method for determining the amount to which the contractor is entitled for the concrete so placed.

2. Contracts: Construction and Operation: Actions of Parties—Contracts: Performance or Default: Release and Settlement

Where a contractor voluntarily signs directives specifying the payments to be

made for the additional work ordered without taking any exception thereto, the unqualified acceptance of the directives involved is found to be binding upon the contractor to the extent of the direct costs entailed in performance of the additional work.

3. Contracts: Construction and Operation: Drawings and Specifications—Contracts: Disputes and Remedies: Equitable Adjustments

Where the evidence clearly establishes that the Government specifications were defective in a number of respects but fails to show that many of the costs claimed are attributable to actions of the Government, the Board—noting that it is impossible to determine the amount to which the contractor is entitled with mathematical exactness—finds that the "jury verdict" method of determining the amount of the equitable adjustment is the most appropriate method in the circumstances presented by the instant appeal.

APPEARANCES: Mr. Melvin I. Primoff, Attorney at Law, Primoff & Primoff, New York, New York, for the appellant; Mr. E. Edward Wiles, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE GILMORE

INTERIOR BOARD OF CONTRACT APPEALS

Contract No. CX 3000-5-9009 was executed by appellant and the National Park Service on Dec. 13, 1974, appellant's bid of \$192,535 having been the lowest of those received in response to an advertised solicitation (IFB). The purpose of

the contract was to stabilize the Tonoloway Creek Aqueduct at the C & O Canal National Historical Park near Hancock, Maryland. One hundred working days¹ were allowed after receipt of notice to proceed for completion of the contract. A preconstruction conference was held on Jan. 14, 1975 (Exh. A-33).² The notice to proceed was handed to appellant on Feb. 4, 1975, at the initial site conference (AF Tab C). The Government allowed appellant 30 days in which to order materials before the official start of the contract period. The first working day charged was Mar. 11, 1975, although the work count started on Mar. 7, 1975 (Exh. A-7). The time count was suspended from Apr. 24 through June 6, 1975, and on July 17 and 18, 1975 (Exh. A-7). The contract time was extended 50 days under various directives given during the contract period. The contract time count was stopped on Mar. 23, 1976, the 158th day of work (Exh. A-8; AF Tab D). Because the contract ran 8 days beyond the allowed contract time, appellant was assessed \$2,000 in liquidated damages (8 days at \$250/day). Appellant filed various claims against the Government by letter dated May 28, 1976 (AF Tab F). After a

meeting and further correspondence, the contracting officer issued his final decision by letter dated Oct. 8, 1976, allowing \$2,208, a fraction of the amount claimed for Class S concrete, and denying all other claims (AF Tab H). Appellant timely appealed. The Board will decide both entitlement and quantum.

Part I. Introduction

The Tonoloway Creek Aqueduct is an old stone "bridge" over a creek. The bridge at one time carried the C & O canal, and a tow-path, over Tonoloway Creek. However, approximately 130 years had taken its toll of the aqueduct (the "bridge") and by 1974 the National Park Service found that the banks of the canal had collapsed and fallen into the creek (Exh. A-3), that many stones had cracked and fallen out of the arch, that a stone buttress had collapsed (AF Tab A, Plan Sheet 3), and that there was a danger that the sides of the aqueduct would collapse outward or the arch would fall apart and cause the entire structure to fall into the creek.

Thus, the National Park Service made a survey of the creek under and near the aqueduct and hired an engineering firm, Green Associates, Inc., to examine and describe the stones of the lower portions of the abutments of the bridge (Site Survey, Exh. A-4). Finally the Federal Highway Administration

¹ Working day is defined at p. D-1 of the contract, Special Provisions, sec. 101—*Definitions and Terms*.

² Abbreviations used:

Exh.—Exhibits introduced at the hearing.

AF—Appeal File documents.

Tr.—Transcript of the hearing.

AOB—Appellant's opening brief.

February 2, 1979

prepared plans for the National Park Service for the "stabilization" of the bridge (AF Tab A). The stabilization scheme was to spray shotcrete (a mixture of sand and cement) on that part of the old stone bridge where the buttress had collapsed, to put 12 big curved steel "ribs" under the bridge to hold it up, to construct a steel and wood "cage" around the whole structure and fasten it to the steel ribs and to tie the whole "cage" around the old stone bridge by drilling holes through the bridge, putting tension rods through the holes and bolting together the rods, cage, and ribs. Also new mortar would be put between the old stones in certain areas. Finally the old bed of the canal would be repaired by the placement of dirt and gravel between new timber walls or sides which would replace the old stone walls. The towpath on top of the aqueduct would also be dismantled and then put back together after the canal bed had been repaired (AF Tab A, Plan Sheet 11). During the stabilization process the contractor would also build two concrete pilasters. These were to be half columns, or small buttresses, of cast-in-place concrete which would strengthen the north (upstream) side of the bridge near the western (lower) abutment, and each pilaster would contain the end points of three tension rods which would go through the stone bridge from one side to the other to keep it from

falling apart sidewise. The construction of these pilasters and the supports for the ends of the steel ribs required the use of two different kinds of concrete, above ground concrete which was called "class A," and underwater concrete which was called "class S."

The work to be performed under this stabilization contract was described (1) on certain drawings or plans, (2) in certain "special provisions," and (3) in a book entitled *Standard Specifications For Construction of Roads and Bridges on Federal Highway Projects, FP-69 1969*. The contractual provisions were set forth in these three documents and various standard forms for construction contracts, for example, 23-A, Oct. 1969 edition. Payment was to be made in accordance with 15 pay items.

Part II. The first and fourth causes of action (Class S concrete)

The first and fourth causes of action, also referred to as "claims," relate to the measurement and payment for class S concrete (concrete used underwater), and the retention of contract monies by the Government upon completion of the project.

Payment for class S concrete was stated in the bid and contract to be at the rate of \$2,000 per cubic yard (AF Tab A, p. E-2).

These two claims are made up of various elements and amounts as follows:

Element No.	Quantity	Dollars	Reference
1-----	1.104 c.y.-----	\$2, 208	AOB p. 5 par. B1 (c.o. determined that this amount was owed to appellant for class S concrete).
2-----	1.898 c.y.-----	3, 796	AOB p. 39 (added concrete claimed for west abutment and pilaster No. 1).
3-----		500	AOB p. 5 par. B2 (withheld by Govt. for unstated reason from Progress Estimate 11).
4-----		2, 000	AOB p. 5 par. B2 (retained by Govt. from Progress Estimate 11 due to assessment of \$2,000 for 8 days lateness).
<hr/>			
Totals:			
(1 & 2)-----	3.002 c.y.-----	6, 004	AOB p. 43 (for class S concrete).
(3 & 4)-----		2, 500	(withheld contract monies).

Findings and conclusions. Class S concrete.

The appellant filed a claim by letter dated May 28, 1976, which included a claim for \$4,000 or 2 c.y. of class S concrete (AF Tab F). The contracting officer (C.O.) in his final decision dated Oct. 8, 1976, said that the IFB estimated this concrete at 8 c.y., that field measurements during performance showed 8.79 c.y., and that the claim was for 10.798 c.y., that project records showed 11 c.y. ordered but that some waste occurred. The C.O. upon obtaining more data, recomputed the amount used as 10.08 c.y., an increase of 1.104 c.y. or \$2,208, and thereafter, in his final decision, allowed \$2,208.

On July 11, 1975, 11 c.y. of class S concrete were delivered and 10.8

c.y. were placed in the form for the west abutment shoring support (Exh. A-30, paid bills and delivery receipts for 11 c.y. class S concrete, H. B. Mellott Estate, Inc.; Tr. III-69, 70). On Oct. 15, 1975, 1 c.y. of class S concrete was placed for pilaster No. 1 (Exh. A-30, paid bills and delivery receipts for 1 c.y. class S concrete, H. B. Mellott Estate, Inc.).

Mr. Bergan, appellant's president, testified that of the 11 c.y. of class S concrete delivered on July 11, 1975, 10.8 c.y. were placed in the form.³ Of the 1 c.y. of class S concrete delivered on Oct. 15, 1975, the entire cubic yard was placed in the form without waste. Mr. Ralph

³ Mr. Bergan testified that 2/10 c.y. hardened in the tremie and was wasted (Tr. II-103, 104).

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Wright, the Government's project engineer, in his entry for Oct. 15, 1975, makes no reference to waste with regard to placement of the class S concrete (AF Diary #4; Exh. A-24, delivery receipts).

[1] Sec. 109.01 of FP-69 entitled "Measurement and Payment" sets forth various provisions governing payment of materials furnished and work performed under the contract, providing in general that "[t]he methods of measurement and computation * * * will be those generally recognized as conforming to good engineering practice * * *." It further provides that "structures will be measured according to neat lines shown on the plans or as directed to fit field conditions." The method of measurement for concrete is set forth on p. 241 of FP-69, sec. 601.14 and specifies that "[c]oncrete will be measured by the cubic yard in accordance with the dimensions shown on the plans or ordered and accepted."

The evidence shows that the Government admittedly had difficulty in taking precise and accurate measurements of the concrete placed under water,⁴ that the field measurements failed to account for the spaces between the stones (Tr. I-105), and that the dimensions used in the computations were based on

an average (Tr. III-72). Because of the imponderables which made it difficult to arrive at an accurate field measurement, we find that the "paid for" concrete, minus the estimated two-tenths c.y. wasted, was the preferable method of measurement and payment for concrete under the circumstances presented herein, and thus should have been the "directed" method of measurement (compare note on page 35 of Exh. A-9 regarding class A concrete). We, therefore, conclude that appellant is entitled under bid item 601(7) to payment for 11.8 c.y. of class S concrete at \$2,000/c.y., or \$23,600. Appellant, having received payment of \$17,596 (Exh. A-9, Pay Estimate No. 11, p. 3), is entitled to \$6,004 plus interest in accordance with the payment of interest clause of the contract.

The withholding of \$2,000 of contract monies by the Government as liquidated damages will be discussed under Part IV, *infra*.

Part III. The third cause of action (Directives and Additional Steel)

The third claim is for \$1,249.48 (AOB p. 51) for the additional costs in performing directives 1 through 5, and for additional steel required to fabricate struts whose lengths were allegedly changed by the Government. From examining schedules K through P of Exh. A-34, the claimed amounts are as follows:

⁴ See comment in contracting officer's final decision (AF Tab H, p. 7) on the difficulty of getting accurate field measurements of rock face under water.

Directive	Amount paid under directives	Schedule of Exh. A-34	Claimed balance
1. (drain pipe)-----	\$925. 80	K	\$89. 38
2. (pack joints)-----	5, 610. 00	L	119. 67
3. (remove rock)-----	669. 96	M	25. 08
4. (lower "sides")-----	431. 99	N	11. 18
5. (blocking)-----	11, 346. 01	O	345. 82
No Directive for steel claim (struts)-----	-----	P	658. 35
Total-----	-----	-----	1, 249. 48

These small claims require decision of substantial legal issues: the effect of accepting a force account document providing for a "lump sum" or "unit price" payment (Directives 1 and 2), and the interpretation of force account payment provisions.

The subject directives authorized payment to be made under contract pay item No. 109(1), which covers "extra and miscellaneous work (subsec. 109.06), contingent sum, \$20,000."

Sec. 109.06 (of FP 69 at p. 63) states that, "Whenever the bid schedule contains a contingent sum pay item or items, the work covered thereby shall be performed only upon written order of the Engineer and payment will be made as provided in the order."

The "Special Provisions" on page D-6 of the contract, supplement sec. 109.06 of FP-69 as follows:

109.06 is supplemented to provide that work covered in the contingent sum pay item will consist of the following described work which is not otherwise provided for in the plans and specifications but which is necessary to complete the improvement planned:

1. Temporary erosion control measures, subsection 107.12.

2. Additional stabilization of north-west wingwall.

3. Foundation grouting at west abutment.

4. Other minor items of work not covered by regular items of the contract.

This work will be paid for under Item 109(1), Extra and Miscellaneous Work (subsec. 109.06).

When appellant began work, rain flowed along the old canal, onto the aqueduct, and out of the spaces where the stone walls of the aqueduct had been before falling into the creek (Exh. A-3). Water was also running through the structure itself (AF Diary #1, Mar. 19, 1975). It is clear that something had to be done if work was to proceed on the contract.

The Government decided to install 60 linear feet of 15-inch concrete pipe approximately 100 feet west of the aqueduct (AF Diary #1, Mar. 20, 1975). This work was done Mar. 25-27, 1975 (Exh. A-35; AF Diary #1, Mar. 25, 26, 27, 1975). On Apr. 1, 1975 the Government issued "Directive No. 1" describing the work and providing

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payment therefor in a lump sum of \$925, and allowing 3 days increase in contract time. On the next day Mr. Bergan, appellant's president, signed the directive where it said, "Please acknowledge agreement to this directive * * *" (AF Tab B).

[2] Sec. 109.04 on p. 60 of FP-69 entitled Force Account Work specifies that force account work "will be paid for at the unit prices or lump sum stipulated in the order authorizing the work, *or the government may require the Contractor to do such work on a force account basis*" (italics added) in accordance with the subsecs. 109.04 (a) through (g).

Payment for work performed pursuant to Directive No. 1 was to be made in a "lump sum" payment of \$925 as stated on the face of the directive (AF Tab B). By voluntarily signing Directive No. 1, without taking exception thereto, appellant is deemed to have unconditionally accepted the terms of the directive. The record clearly indicates that the directive accurately reflected the agreement and understanding between the parties as to the work to be performed, the amount of compensation to be paid and the number of days allowed for performance of the work.⁵ We find that both the project engineer who issued the directive and the president of appellant company who accepted the directive had actual authority to bind the Government and

appellant, respectively; and that appellant's unqualified acceptance of Directive No. 1 was a binding agreement as to the direct cost to be paid for performing the additional work.⁶

In addition, we question the claim for payment of work under work days June 20, and Apr. 8, 1975, noted in Schedule K of Exh. A-34 since appellant's president testified that work under the directive had been completed prior to his signing the directive on Apr. 2, 1975 (Tr. II-106, 107), and no record of the work appeared in Engineer Wright's diary (Exh. A-5). We will not dwell on this point, however, since we find in any event that the "agreement" encompassed all work performed under the directive, whether completed before or after acceptance of the directive by the appellant. The Government, having satisfied its obligations under the directive, is not liable to the appellant for the additional amounts claimed. The claim under Directive No. 1 for \$89.38 is denied.

The parties found that there were much deeper spaces between the stones of the aqueduct than anticipated which made the originally planned "pointing" of these spaces excessively expensive (Tr. 24). Thus, they agreed on a method of "dry-packing" the spaces before doing the "pointing," which would achieve the same end result at a considerable savings to the Government.

⁵ Part IV will deal with claims for delays wherein we find that Government-caused delays occurred which were not satisfied or "released" by the various directives.

⁶ Cf. *Merritt-Chapman & Scott Corp., et. al. v. United States*, 198 Ct. Cl. 223 (1972).

This work was performed. Mr. Bergan agreed to Directive No. 2 at a "unit price" per bag of cement. The directive was signed by both the Government and the appellant.⁷ For the same reasons given in our discussion under Directive No. 1, appellant is bound by the agreement and the claim under Directive No. 2 in the amount of \$119.67 is denied.

Directive No. 3 was issued by the Government on July 21, 1975, and signed by appellant 2 days later. It provided for the removal of rock at the east abutment to allow placement of the steel ribs. Payment was to be on a force account basis per "invoice prices" (AF Tab B). This signified that the parties agreed that payment for the force account work would be according to the provisions set forth in FP-69, sec. 109.04(a) through (g).

The \$25.08 difference between payments made and the \$695.04 claimed appears to be due to a change by the contractor in its equipment rental rate from \$1.05/hour to \$2/hour and a 15 percent mark-up on equipment. (Compare Exh. A-6 and Exh. A-34, Schedule M.)

We find that appellant and the Government agreed upon \$1.05/hour for the rental rate of the Ford van (see Exh. A-6, Daily Force Account Statements signed by authorized representatives of both parties) and that appellant accepted payment for work under Directive No. 3 on the basis of that rate, no protest having ever been voiced.⁸

Sec. 109.04 provides that the equipment rental rates shall be paid at the rate agreed upon in writing prior to the start of work. Although no agreement was made prior to the start of work, there was certainly an agreement during the time of performance as evidenced by the written daily statements signed by the parties. With regard to the claim of 15 percent mark-up for equipment, sec. 109.04 of FP-69 states that "[n]o percentage shall be added to equipment rental rate * * *." The claim for \$25.08 under Directive No. 3 is denied.

There is nothing in the appeal record indicating the basis for appellant's claim of an additional \$11.18 for work performed under Directive No. 4. Because appellant has failed to prove this claim, it is denied.

With regard to the cost of work performed under Directive No. 5 and the amendment thereto, appellant has been paid \$11,346.01 and is claiming an additional \$345.82.

The amendment to Directive No. 5 (signed by appellant's president on Mar. 1, 1976) incorporates the terms originally set forth in Directive No. 5 unless otherwise changed. Appellant, by signing and acknowledging acceptance of the amendment was, in fact, accepting Directive No. 5 in its amended form. The legal implications of appellant's failure to sign Directive No. 5 became a moot issue upon appel-

the face of the documents taking no exception thereto at that time; appellant took no exception to this item at the time of payment under Pay Estimate No. 11, nor did appellant include this in its initial claim to the contracting officer.

⁷ AF Tab B.

⁸ Appellant signed the daily force accounts statements which indicated the rental rate on

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lant's acceptance of the terms in the amendment.

The additional cost claimed appears to be due to the alleged rental rate of \$2/hour for the Ford van and a 15 percent mark-up on equipment. We find that appellant agreed to the rental rate of \$1.03/hour for the use of the Ford van and is bound by that agreement. As previously discussed under appellant's Directive No. 3 claim, mark-ups on equipment rental rates are not allowable under the contract terms. (See sec. 109.04 of FP-69.) The claim under Directive No. 5 in the amount of \$345.82 is denied.

We find no liability on the part of the Government for the cost of additional quantities of steel used by appellant on the project since appellant was aware on Apr. 22, 1975, when Change Order No. 1 was executed (shop drawings were submitted in Feb.) that the steel was being paid for on a lump-sum basis and not by unit prices as ordered. Appellant did not protest or complain but accepted and signed Change Order No. 1 on that basis, all facts having been in at that time. (See also Exh. A-15 dated Feb. 27, 1975.) Appellant's claim for \$658.35 for additional steel is denied.

*Part IV. The second cause of action
(Delay costs due to defective specifications)*

The major part of appellant's appeal is the \$71,706 claim in the second cause of action. Here appellant asserts that the plans and specifications were defective and misleading (AOB pp. 6-37). Appellant alleges

that the following contract defects caused the delay encountered in performance of the contract:

(A) The drainage for the project was inadequate (AOB p. 7).

(B) There was numerous errors in dimensions and elevations in the plans (AOB pp. 8 *et seq.*).

(C) The arch shoring (the construction and placement of the steel ribs) scheme was defective (seven reasons cited) (AOB p. 11).

(D) The scheme to place the dirt, etc., on top of the aqueduct was disrupted by the delays to the arch support and the correction of defects in the plans for the "walls" or bulkheads on the top of the aqueduct and the imposition of a weight restriction which previously had been ignored by the Government (AOB pp. 29-31).

The Government's position, as stated in the answer, is a general denial plus the affirmative defenses of lack of notice under clause 2 of SF 23A (specifications and drawings)⁹ or clause 23 (suspension of work).

The Government in some of its evidence contests the appellant's contention that work had to be performed in a certain chronological order; it also asserts that certain work was done inefficiently or too slowly with insufficient and poorly organized personnel, that appellant was delayed by its own inexcusable failure to submit data that was a prerequisite to necessary Government approvals, that the Govern-

⁹ "In case of discrepancy * * * the matter shall be promptly submitted to the Contracting Officer * * *."

ment timely approved appellant's shop drawings for the steel ribs, that appellant acted promptly on verbal orders (which later became Directive No. 5) and later unreasonably delayed work while insisting on a written Directive No. 5 (blocking).

From the record on the whole, we find that the contract was defective and misleading in many instances. First, the scheme for stabilization neglected to control the water in the canal. Secondly, the drawings contained erroneous dimensions so that field measurements necessarily took longer than appellant reasonably estimated from the bid package. Thirdly, the bid package indicated that the steel arches (ribs) would be uniform in shape and elevation. Fourth, the plans neglected to provide for removal of part of the ledge at the east abutment. Fifth, the plans were defective as to the construction of the bulkheads (or "walls") and had to be corrected. Sixth, the scheme as to diamond drilling, the pilasters and the location of the lagging was incomplete and misleading and had to be corrected. Seventh, the bid package was erroneous as to the shape of the stones of the west abutment and the form for the underwater concrete there had to be changed. Eighth, the package was misleading as to the necessary capacity of the temporary jacks. These, and the weather, were the major causes of the delays which extended the performance period of this contract and eventually led to the assessment of liqui-

dated damages. We will discuss each of these separately.

The bid, and contract package contained plans and specifications for a scheme to fabricate 12 curved steel ribs. Those ribs would then be slid under the aqueduct and jacked up by temporary jacks until they were a few inches from the stone arch. Then 2-inch by 4-inch wooden "lagging" would be placed between the steel ribs and the aqueduct and finally the ribs would be jacked up as permanent support for the aqueduct (AF dwgs. G-6580, G-6581). However, as soon as the appellant came to the site to start work he discovered that rain and other water was flowing down the old canal to the aqueduct and flowing over and through the old structure so that it was often impossible to perform the contract work. This constituted a type two differing site condition.¹⁰ The Government recognized this problem and corrected it by issuing Directive No. 1 which was a supplemental agreement that paid for the direct cost of correcting the defect. We find that the time extensions and costs allowed under Directive No. 1 for correction of the drainage problem did not include the costs incurred by appellant with respect to delays incident to that change. The delay costs of which appellant complains were not satisfied or "released" upon appellant's signing of the directive. The "Differing Site Conditions" clause does not allow recovery for pre-change delays incident thereto.

¹⁰ *Phillips Construction Co., Inc. v. United States*, 184 Ct. Cl. 249 (1968).

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Such costs are recoverable, however, under the Suspension of Work clause.¹¹

We find that appellant was slightly delayed in its work progress prior to the change since the evidence shows that the back-up of water caused by the inadequate drainage prevented appellant from proceeding with the initial phases of work. Boards have consistently held that strict compliance with the 20-day notice provision is not necessary where the Government was quite aware of the operative facts giving rise to the claim.¹² Before Directive No. 1 was issued by the Government, the project engineer recorded in his project diary several instances where work was delayed due to the water problem and that appellant was paying its laborers "show-up" time (AF Diary #1). We find that appellant is entitled to damages stemming from office and field expenses during the delay.

The contract contemplated that there would be 15 working days to "monitor arch" between nodes 2 and 5 on the CPM chart (Exh. A-17). The parties intended that appellant would "verify dimensions" for the steel before ordering it (note on G-6580), and as to MC 6 x 18 struts

the "contractor should verify lengths in field before ordering material" (G-6577), and note "dimensions shown [on G-6575] of the existing structure [the aqueduct and abutments] which affect proposed new construction should be verified in the field."

Appellant alleges that the following errors were found in the Government's dimensions:

(1) On Government drawing G-6575 as compared to appellant's shop drawing 2436-1 (Exh. A-11):

(a) an error of $4\frac{1}{4}$ inches in the dimension from the keystone to the west abutment

(b) an error of $5\frac{1}{4}$ inches in the dimension from the keystone to the east abutment

(c) an error of .87 feet in the elevation between the downstream keystone and the west springline

(d) an error of .425 feet in the elevation between the downstream keystone and the east springline.

(2) On Government drawing G-6575 as compared to a later Government drawing submitted to appellant (Exh. A-15):

(a) an error of .51 feet in the elevation of the downstream keystone

(b) an error of .31 feet in the height of the upstream keystone elevation as compared to the downstream keystone elevation

(c) the width of the structure at elevation 413.8 is .4 feet narrower at the west end and .45 feet narrower at the east end.

(3) On Government drawing G-6580 as compared to appellant's shop drawing 2436-1 (Exh. A-11):

¹¹ Clause 23, Standard Form 23-A (Oct. 1969 Ed.). The "Changes" clause as prescribed for use in 1968 allows recovery for prechange delays but only if the change was caused by defective specifications. Delays connected with other types of changes are recoverable under the "Suspension of Work" clause (32 FR 16268 and Appendix.)

¹² See *Hartford Accident and Indemnity Company, IBCA-1139-1-77* (June 23, 1977), 84 I.D. 296, 77-2 BCA par. 12,604.

(a) an error of 1 foot, $9\frac{3}{4}$ inches in the radius of the west segment of the steel ribs

(b) an error of 2 feet, $9\frac{3}{4}$ inches in the east segment of the steel ribs (AOB, pp. 8, 9, 10).

The Government does not refute the alleged errors in the dimensions asserted by appellant, but contends that because appellant was required by the contract to verify field measurements, it was on notice that time would be needed for this, that differences would be found, and thus, should have accounted for these contingencies in its bid price.

Experience has dictated that some degree of difference will more than likely be found in any field measurements taken by different persons at different times. The issue, therefore, is the degree of difference or tolerance which should be reasonably expected under the circumstances presented here. Any damages arising from errors beyond the acceptable tolerance are compensable under the "changes" clause of the contract.¹³

In an analogous case, the Navy supplied "guidance plans" for the construction of a ship, and the specification required the contractor to check those plans and correct any errors in them. But the ASBCA held that the Navy had to pay for the delay and disruption (and certain added work) caused by the discovery of errors in the Navy plans.

(*Bethlehem Steel Co.*, ASBCA

13341 (Nov. 19, 1971), 72-1 BCA par. 9186.)

Mr. Bergan, appellant's president testified that, in this case, he considered " $\frac{1}{10}$ of a foot" to be the acceptable tolerance (Tr. I-35), adding on p. 44 of Tr. II that "you can fluctuate by one digit of your last numeral in the number." Mr. Sanders, a civil engineer with the Federal Highway Administration who was responsible for the contract plans, testified that although he used fractions rather than decimals, $6\frac{3}{8}$ inches would, in his opinion, allow a variance of plus or minus another eighth of an inch (Tr. III-124). In this particular case, the Board finds the reasonable tolerance to be plus or minus 1 inch, since in most instances "inches" is the smallest unit of measurement shown on the Government plans.

We find that appellant was inconvenienced and delayed as a result of the many field verifications that were made to secure the proper measurements prior to ordering materials. The errors found by appellant were beyond the tolerance this Board considers to be reasonable. The Government is, therefore, liable for the added cost incurred as a result of these defective specifications.

We find that Mr. Bergan reasonably interpreted language on drawing G-6581 to mean that temporary jacks need only exert $7\frac{1}{2}$ tons force to properly place the steel ribs. Although the jacking tonnage specified in the contract referred to the

¹³ In *H. W. Caldwell and Son, Inc.*, IBCA-824-2-70 (May 30, 1973), 80 I.D. 345, 73-2 BCA par. 10,069, the Board found for appellant where the Government required unreasonable tolerances in the specified grading.

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permanent jacking,¹⁴ it was reasonable for appellant to assume that the temporary jacking would require less exertion than the permanent jacking since more structural weight is shifted to the permanent jack, which supplies the main thrust to the ribs and the arch structure (Tr. III-108). However, appellant found after several attempts to perform the work as set forth on the plans, that the 7½ ton capacity specified was not sufficient (Tr. I-117, Tr. II-145). Appellant was delayed while it located 50-ton jacks and used them in lieu of the 12-ton jacks which it had originally obtained to use in the temporary jacking process. The Government introduced no evidence to show that the capacity specified in the contract was adequate. The Government acquiesced in the jacking method chosen by the appellant, and did not provide the assistance and clarification appellant had requested in this regard (Tr. III-162, 163). We find that appellant is entitled to damages resulting from the delays encountered in attempting to comply with the Government plans as written and in locating the jacks needed to perform the work.

The Government plans were defective in the arrangement of the wooden walls (or bulkheads) shown on G-6577. The Government had to and did correct this defect by issuing Directive No. 4 (AF Tab B). This directive covered the

change itself but did not account for the delays which were incidental to the change. We find that some delay in the sequence of work and productivity occurred for which the Government is liable.

The Government scheme of construction was incomplete as it related to the construction of the pilasters, the diamond drilling through the aqueduct and the sequence of construction of the steel ribs, the lagging, the tie-rods, and the heavy structures on top of the aqueduct. For a substantial period of time the Government did not enforce the load limit set out in Special Provision 105.13 "no construction loads will be allowed on the aqueduct in its present condition * * *." It later restricted the loads appellant could put on the aqueduct. Further the Government's design was unclear as to the timing and interrelationship between the construction of the pilasters, the diamond drilling and the placement of the wooden lagging on top of the steel ribs. The contractor had to change the pilasters from class A concrete to at least partially class S concrete. The lower tie-rod had to fit over the steel ribs between parts of the lagging. The ends of the tie rods had to be located within 2 inches of a vertical line through their ends. Thus it became necessary to locate the bottom tie-rod when about one-fourth of the lagging was done, drill the holes with the diamond drill, then complete the pilasters and the rest of the lagging. This caused some change in sequence of

¹⁴ See *Suggested Shoring Construction Sequence* at upper lefthand corner of drawing G-6581 (AF Tab A).

work and lengthened the proper performance time for the contract. This was not the fault of the contractor. It resulted from the misleading details in the Government's design.

The Government's design was also erroneous in its details of the shape of the foundations for the west abutment (Dwg. G-6581). The foundation was more complex in shape than shown on the Government plans and this complexity required appellant to build a bigger form and pour more concrete than it had reasonably estimated. Thus, appellant had to spend more time than it had reasonably planned to do this work.

The final major defect in the Government design was the omission of wooden blocking needed to support the aqueduct. Drawing G-6578 sec. B-B states, "Blocking at missing stones (6" x 8" min.)" with an arrow pointing to a place where a stone is missing. Likewise drawing G-6577, upper half, has a note "Block out over rib at missing stonework (6" x 8" min.)" and an arrow pointing to a place where stonework is missing. These notes are *not* related to the blocking that was required and was added by Directive No. 5. The Government had to correct the omission of certain blocking because of the elevation and twist of the aqueduct. This blocking was necessary to fit between the lagging and the aque-

duct. It was necessary so that the steel ribs would support the aqueduct.

The Government issued this change order verbally on Oct 8, 1975 (AF Tab H, C.O.'s final decision), but did not issue it in writing until Dec. 10, 1975. The Government complains that appellant, although starting on the work in November (Exh. A-6) did not fully perform this added work pursuant to the verbal order but after a certain period of time insisted on a written directive. We conclude that the appellant's conduct was reasonable under the circumstances. It was the Government's design that was defective. Thus, it was the Government's duty to both pay the costs caused by the defects and to correct those defects. The changes clause gives the Government the contractual right to change the plans and specifications and the contractor has no right to refuse such added work even though it may be added work which it had not planned or scheduled. The Government if it chooses to exercise this right should do so in accordance with the Changes clause—issue a change order in writing within a reasonable time. Certainly, a contractor is not expected to continue working indefinitely without written authorization. The Government's omission of this blocking from its drawings and its unreasonable delay in issuing a written change order were major causes of

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delay to this project, for which appellant should be compensated.¹⁵

Appellant alleges that because of the various delays and interferences caused by the Government, it was pushed into working during the winter where severe weather caused it to suspend work on several occasions.

With regard to appellant's suspension of work from Feb. 6, through Mar. 14, 1976 (Exh. A-7), we find that Government-caused delays were the reasons the suspension became necessary. Appellant could not have contemplated at the time of bidding that the work would be prolonged to this extent. With regard to other delays allegedly due to bad weather, they are denied since appellant has failed to show that the weather encountered was unusually severe. In any event, it is clear that not all of the delays can be attributed to actions of the Government.¹⁶

The Government has questioned the timeliness of appellant's delay claims which resulted from the discovery and correction of defective specifications. We find that appellant was timely in its claim of damages in this regard since it was not until very late in the contract that appellant came to realize the detri-

mental effect such delays were having on its performance. It was the accumulation of these delays that brought appellant to question their effect on the project.¹⁷

We find that appellant notified the Government within a reasonable time after ascertaining the nature and extent of the claim. We further find that the 20-day notice provision set forth in the "Changes" clause is not applicable to defective specifications.¹⁸

Equitable Adjustment under Part IV

[3] With regard to the delay damages under the second cause of action, appellant has clearly established that the Government's specifications were defective in a number of respects. It has failed to show, however, that many of the costs claimed are attributable to actions of the Government (Exh. A-34 and Exh. A-30). The record also shows that (i) the causes of delay were overlapping in many instances, (ii) Government-caused delays were intertwined with delays caused by the appellant, (iii) on many days claimed, work was "slowed" rather than "stopped," and (iv) contractor inefficiency was not taken into consideration by appellant.

The Board finds that unknown factors and imponderables make it impossible to determine with math-

¹⁵ *Luria Brothers and Co., Inc. v. United States*, 177 Ct. Cl. 676 (1966).

¹⁶ The record shows that appellant exercised unreasonably tight supervision over its workers to the point that the project often slowed down while workers waited for directions, that on many occasions the job was not adequately manned, and that appellant often chose more difficult and time consuming methods of performance than was necessary.

¹⁷ Cf. *Power City Construction & Equipment, Inc.*, IBCA-490-4-65 (July 17, 1968), 75 I.D. 185, 68-2 BCA par. 7126.

¹⁸ Standard Form 23-A, October 1969 Ed., clause 3, par. (d).

ematical exactness the amount to which appellant is entitled. Because appellant did not show with definite certainty the exact amount of loss due to these delays, and because the "total cost" method is rejected by this Board for the various reasons stated above, we find that the "jury verdict" method of determining an equitable adjustment is the most appropriate under the circumstances presented herein. There is some evidence which we deem sufficient for this purpose.¹⁹

With regard to the assessment by the Government of liquidated damages in the amount of \$2,000, we find that although the Government was generally accommodating in its extension of contract time due to various excusable delays which occurred throughout the contract, the Government did not recognize some of the delays, to which we have addressed ourselves above, as being caused by the Government. A contractor may not be assessed liquidated damages arising from excusable delays including acts of the Government.²⁰ We find that the delays for which the Government was responsible amounted to 8 days beyond those time extensions previously allowed by the Government.

We find that under the second cause of action appellant is entitled to an equitable adjustment in the amount of \$20,000 and that the contract time should be extended by 8 additional days.

¹⁹ *WRB Corp. v. United States*, 183 Ct. Cl. 409 (1968).

²⁰ *Larco-Industrial Painting Corp., ASBCA 14647 et al.* (Apr. 27, 1973), 73-2 BCA par. 10073.

Interest

The contract contains under its provisions the clause entitled "Payment of Interest on Contractor's Claims." In addition, therefore, to the equitable adjustment, interest should be paid thereon in accordance with this clause.

Summary

Appellant is entitled to the monies withheld by the Government upon completion of the contract, an 8-day time extension, the sum of \$6,004 for class S concrete (this includes the \$2,208 determined by the C.O. to be due but was not paid), and the sum of \$20,000 for delay costs due to defective specifications. All other claims are denied. The question of interest is remanded to the contracting officer for determination of the amount to be paid pursuant to the payment of interest clause.

BERYL S. GILMORE,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

LEE S. BIELSKI

39 IBLA 211

Decided February 8, 1979

Appeal from the decision of the New Mexico State Office of the Bureau of Land Management, dismissing appellant's protest against the impending

issuance of an oil and gas lease to the second drawee (NM 30886).

Reversed and remanded.

1. Evidence: Generally—Oil and Gas Leases: Applications: Generally

Where an oil and gas lease offeror fails to respond within a prescribed period of time to an order to submit specific information necessary to determine whether his offer is valid, it is appropriate to reject the offer.

2. Administrative Practice—Evidence: Generally—Oil and Gas Lease Applications: Generally

Where a protestant against the issuance of an oil and gas lease supports his allegations that the lease offer is not qualified with sufficient evidence to warrant further inquiry or investigation by BLM, the protest should not be summarily dismissed for failure of the protestant to make positive proof of his allegations. Instead, the protest should be adjudicated on its merits after all available information has been developed.

3. Administrative Authority: Enforcement of Criminal Violations—Office of Hearings and Appeals

The Board of Land Appeals, in its adjudication of appeals to determine rights of parties to receive or preserve interests in Federal lands, has a concomitant obligation to preserve the integrity of the process, and where it appears to the Board that the administrative record of a case contains strong evidence of multiple violations of 18 U.S.C. § 1001 (1976), the Board will refer the matter with its recommendation that an investigation be initiated to determine whether criminal charges should be brought.

APPEARANCES: R. Hugo C. Cotter, Esq., Albuquerque, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

On May 23, 1977, the New Mexico State Office of the Bureau of Land Management (BLM), conducted a drawing of simultaneously filed oil and gas lease offers. Four thousand, nine hundred and two offers were filed for one of the parcels included in that drawing, *i.e.*, Parcel NM-704. Three drawing entry cards for this parcel were drawn to establish priority of consideration of the lease offers represented by the respective cards. The drawees, in order, were:

(1) Tina A. Regan, 5000 Hollywood Blvd., Hollywood, FL 33021,

(2) Lucy Allen Dohn, 1888 Century Park E., 6th Floor, Los Angeles, CA 90067,

(3) Lee S. Bielski, 5035 Klinge St., NW., Washington, DC 20016.

The Regan offer, having first priority, was rejected for the reason that the card was improperly dated. On appeal to this Board, the rejection was affirmed. *Tina A. Regan*, 33 IBLA 213 (1977). This cleared the way for adjudication of the offer filed by the number two drawee, Lucy Allen Dohn.

However, on Mar. 22, 1978, R. Hugo C. Cotter filed a formal protest against the issuance of the lease to Dohn. Cotter, an attorney, declared that he had filed a card for Parcel NM-704, although his card had not been drawn. It was, and is,

Cotter's contention that Dohn's card falsely represented that she was the sole party in interest in the offer and any lease issued pursuant thereto; that Dohn was in fact a client of a leasing service, Leland Capital Corp. (LCC), whose contract with Dohn provided for a "security interest" in any lease Dohn might be awarded "to secure payment of any advance rentals paid by LCC on Client's behalf"; that this invested LCC with an "interest" in every offer filed by LCC on behalf of its clients, as defined in 43 CFR 3100.0-5 (b); that the failure to disclose this interest and file the statements required by 43 CFR 3102.7 disqualified the offer and mandated its rejection; that other LCC clients also filed offers for parcel NM-704 in which LCC had the same "security interest," and therefore LCC had an interest in multiple filings for that parcel in violation of 43 CFR 3112.5-2, requiring rejection of all cards filed for that parcel by LCC clients, including Dohn's. Cotter further asserted that, as LCC was Dohn's agent, rather than a mere amanuensis, the failure to file the separate statements required by 43 CFR 3102.6-1 was a violation of that regulation.

In support of this protest, Cotter submitted a blank copy of the contract form allegedly in use by LCC at the time Dohn contracted for LCC's services. This specimen contract contains the "Security Interest" clause as its par. 3.

Subsequently, Lee S. Bielski, the number three drawee, adopted the contentions argued by Cotter and

filed her own protest against the issuance of the lease to Dohn.

BLM responded to the Cotter/Bielski protests by calling upon Dohn to furnish additional evidence. Action on the protests was deferred. Dohn responded to the order to supply further information by stating that her business address was % Leland Capital Corp. at the corporation's office, that she had selected the parcel which was the subject of her offer, that she had personally signed the drawing entry card after the offer was formulated, and that her card was dated by her after the offer was formulated. Leland Capital Corp., by its vice president, submitted what purported to be a machine copy of its notarized contract with Philip H. Dohn, Jr. and (Mrs.) Lucy Allen Dohn. Executing the contract on behalf of Leland Capital was its representative, whose signature appears to read "Stephen Z. Flynn." The contract is dated in its preamble "this 26th day of April 1977." The contract is acknowledged by one Deborah Lile, Notary Public, who twice dated her acknowledgement "April 26, 1977."

The machine copy of the contract between Leland Capital and the Dohns was on a different form than the specimen contract submitted by Cotter, and did not contain the "security interest" clause. The letter transmitting the machine copy of the Dohn contract to BLM was signed by Leland Capital Vice President Paul R. Colacecchi, and asserted, "Leland Capital Corpora-

February 8, 1979

tion has no interest in any leases won by the clients." This letter is dated May 10, 1978.

After BLM's receipt of the Dohn statements, the Colacecchi letter and the machine copy of the purported service contract between Leland Capital and the Dohns, BLM issued separate decisions dated June 15, 1978, dismissing the protests of Cotter and Bielski. Cotter, acting on behalf of both protestants, then requested reconsideration of those decisions on the ground that the information furnished by Leland Capital and Lucy Allen Dohn was false and fraudulent. His allegations at that point are set out verbatim, as follows:

1. *The Service Contract on which the Decision was based is False and a Fraud on the United States.*

The Leland Capital Corporation Service Contract which you used to arrive at your decision, a copy of which is attached, was purportedly signed by the parties and notarized on April 26, 1977, some 22 days prior to Dohn's submission of an Entry Card on the captioned lease. It bears the acknowledgement of California Notary Public Deborah Lile who asserts that the Dohn's personally appeared before her on April 26, 1977 and signed the contract. The notary's seal shows that her Commission expires August 9, 1981. Under Section 8204 (Government) of the California Annotated Codes, a copy of which is attached both in its original form and as amended a Notary's commission has a term of four (4) years and this has been true as you can determine from the copy of the statute at least since 1934. This means that Deborah Lile obtained her commission as a Public on August 10,

1977, more than three months after she allegedly notarized the Dohn signatures. It cannot be argued that she may have been a Notary Public on April 26, 1977, under a previous commission since if that were the case her seal would have to show an expiration date in 1977 as provided in Section 9207 (Government), a copy of this statute as amended also being attached. It is indisputable that if the Dohn's ever did actually sign the Service Contract sent to you, it had to be after August 10, 1977. Since Lucy Allen Dohn's entry card is dated May 18, 1977, the agreement sent to you could not have been in effect at the time she made an offer to lease. Since she did not within the prescribed time submit a copy of her true agreement with Leland Capital she should be disqualified on that ground alone. The false notarization is a crime in California and the attempted fraud on any agency of the United States of America should bear investigation.

2. *The Actual Service Contract between Lucy Allen Dohn and Leland Capital Corporation had to be executed on the Form submitted with my Protest.*

Through March, 1978 the only Service Contract from [sic] supplied by Leland to its customers was the one attached to my protest. As late as March 13, 1978, it was the only such form of contract in existence as more fully appears from the Affidavit of Billie Hall attached hereto.

3. *That the Form of Service Contract Falsely claimed to have been signed by Lucy Allen Dohn on April 26, 1977 was not printed until almost one year later.*

During the Spring of 1978 Joe Schutz of Schutz Abstract Company, Santa Fe, New Mexico, was employed by Leland Capital to assist in the preparation and review of a form of Service Contract which did not violate sole party in interest regulation and the result was the form submitted to you as signed April 26, 1977, as more fully appears from my affidavit attached hereto.

Lucy Allen Dohn has submitted to you a false Service Contract, fraudulent on

its face without outside evidence necessary to show the fraud. Reconsideration of her submission must require her offer to be dismissed and the captioned lease offered to Lee S. Bielski, third party holder. [Italics in original.]

In support of these contentions Cotter supplied his own affidavit concerning his interview with Joe Schutz, an affidavit by one Billie Hall, attesting that Leland Capital has presented to her the form of contract containing the "security interest" clause on Mar. 13, 1978, and copies of California statutes relating to the term of the office of a notary public.

Upon receipt of the foregoing, BLM vacated its dismissal of the Cotter/Bielski protests and issued another decision dated July 17, 1978, calling upon Dohn to supply certain additional information. The decision, addressed to her at the office of Leland Capital Corp., recited the allegations made by Cotter in his motion for reconsideration of his protests, and required Lucy Allen Dohn to submit the following information:

1. Certified proof from the State of California that Deborah Lile was a Notary Public on April 26, 1977.
2. The date Deborah Lile's commission expired, if it expired in 1977.
3. The date it was renewed and the next expiration date.
4. Explain how the contract submitted by the offeror was in existence at the time the offer was filed.

The statements must be filed within thirty (30) days from receipt of this Decision. In the event, the statements are not filed within the time allowed, this offer to lease/application will be considered finally rejected and closed.

The only response was a letter from an attorney, Gary E. Gleicher, whose law office letterhead bears the same address as Leland Capital Corp., the pertinent portion of which is as follows:

I am writing this letter on behalf of Mr. and Mrs. Phillip Dohn in response to your request for additional information regarding the Service Contract between LUCY ALLEN DOHN and LELAND CAPITAL CORPORATION, hereinafter "LELAND".

Mr. and Mrs. DOHN became clients of LELAND on April 26, 1977. On that date, they executed a valid Service Contract with LELAND and issued a check to LELAND in the amount of \$2,000.00 as consideration for said agreement. A copy of said check is attached hereto for your reference.

On April 18, 1978, your office requested evidence of the Service Agreement between LELAND and LUCY ALLEN DOHN. A thorough search of LELAND's files revealed that the original contract had been misplaced. In an attempt to comply with the regulations and requirements of the Bureau of Land Management, on April 26, 1978, a duplicate contract was prepared, executed by the DOHNs and notarized by Ms. DEBORAH LILE.

Due to a clerical error, the word "Duplicate" was omitted from the prepared copy of the contract. Further, when the document was given to Ms. LILE for notarization, she inadvertently affixed the date April 26, 1977 instead of April 26, 1978, the accurate date of notarization. Coincidentally, the date of the original statement and the date of the notarization were exactly one (1) year apart, which may explain why Ms. LILE inadvertently affixed the incorrect date.

Mr. and Mrs. DOHN and LELAND have made every effort to comply with the requirements of the Bureau of Land Management, and, by this letter, it is my intention to clear up any confusion which has resulted in regards to this matter. In

reviewing the facts, I find the above to be true and correct.

* * * * *

Not only is the foregoing totally unresponsive to the requirement for the specific information called for by BLM's decision of July 7, 1978, we regard it to be of extremely dubious credibility.

A copy of the Gleicher letter was provided to Cotter by BLM. Cotter responded by pointing out that Gleicher's letter failed to provide any of the information required, and did not dispute the sworn evidence previously submitted by Cotter "that a different and defective agreement was in use by Leland Capital in 1977." Cotter further questioned whether the explanation that the notary had "inadvertently" affixed the date Apr. 26, 1977, below her signature also served to explain why that date had been typed in the body of her acknowledgement as well. Cotter also queried why, if Gleicher was the Dohn's lawyer, he could not supply his own clients' copy of 1977 contract, even if the Leland Capital copy had been "misplaced."

Nevertheless, by its decision of Nov. 6, 1978, BLM again dismissed the Cotter/Bielski protest "on the basis that this office cannot accept your statements as positive proof of the allegations made."

Cotter has abandoned his protest on his own behalf in favor of asserting it on behalf of his client, Lee S. Bielski. In that capacity he has filed this appeal from BLM's dismissal of Bielski's protest. A copy

of the appeal was served Lucy Allen Dohn at her address of record (the LCC address), but she has not responded.

Appellant's statement of reasons is focused on the fact that the BLM decision of July 17, 1978, required Lucy Allen Dohn to submit four specific items of information within 30 days, failing which her "offer to lease/application will be considered finally rejected and closed." Appellant points out that none of the required information was submitted, that the reply from Dohn's attorney was nonresponsive to the decision, and that the time set by BLM for compliance has long since expired. Therefore, appellant contends, BLM should have implemented its own decision, rejected Dohn's offer and issued the lease to her. We agree.

[1] Where an oil and gas lease offeror fails to respond within a prescribed period of time to an order directing him to submit specific information necessary to determine whether his offer is valid, it is appropriate to reject the offer. *Ricky L. Gifford*, 34 IBLA 160, 163 (1978). Even where the lease has issued, the Department may require the lessee to submit additional information to establish that he was rightly entitled to have received it, and if he fails or refuses to respond, the lease may be canceled. *Robert A. Chenoweth*, 38 IBLA 285 (1978), and cases cited therein. The State Office had full authority to require the offeror to submit the additional information it deemed necessary to

determine the offeror's qualifications. *Ricky L. Gifford, supra*; *Evelyn Chambers*, 31 IBLA 381 (1977); *D. E. Pack*, 30 IBLA 166 (1977). Therefore, when Dohn did not supply any of the information she was required to submit within the time prescribed, her offer should have been rejected, as the BLM order indicated it would be.

[2] Moreover, the State Office erred in dismissing appellant's protest for the reason that his statements and evidentiary submissions could not be accepted as "positive proof of the allegations made." Perhaps the State Office was led into this error by our numerous holdings to the effect that where there is no evidence in the administrative record of a violation by the offeror holding priority, the burden is on the protestant attacking the validity of the offer "to prove" an accusation that there is a disqualifying discrepancy. See, e.g., *Clyde E. Frazier*, 36 IBLA 141 (1978), where the verb "to prove" appears in the headnote in this context, but not in text, which, at 36 IBLA 143, states only that "the burden is on the protestant to submit material evidence of an accusation * * *." *Virginia L. Jones*, 34 IBLA 188, 193 (1978), requires a protestant "to submit competent proof of an accusation * * *," as do a number of earlier decisions. But in *Georgette B. Lee*, 3 IBLA 171, 176 (1971), we held simply that, "[a]bsent an adequate showing of disqualification, a protest alleging disqualification is properly re-

jected." In *Bruce E. Watkins*, 36 IBLA 168 (1978), we said, "a successful drawee * * * will not be disqualified * * * by reason of unsubstantiated allegations * * *."

Admittedly, the burden of a protestant in such cases has been poorly and imprecisely defined. But insofar as our research reveals, we have never gone so far as to hold a protestant must make "positive proof" of his allegation to avoid dismissal of his protest. We think the rule should be that where a protestant supports his contention with sufficient evidence to warrant further inquiry or investigation by BLM, the protest should not be summarily dismissed, but adjudicated on its merits after all available information has been developed.

In this instance, Cotter not only supplied sufficient evidence to inspire BLM to demand further information from Dohn, he also detected and pointed out to BLM how the submissions from Dohn and LCC were false, and buttressed his contention that Dohn's evidence was manufactured by supplying copies of the relevant California statutes relating to notaries public, and with affidavits. This evidence was the basis of BLM's second demand on Dohn, so it is apparent that BLM recognized that Cotter's evidence was adequate to create a justiciable issue, which it became incumbent on the Bureau to resolve. But when BLM's further demand for specific material and relevant information was fended off by Gleicher's unre-

sponsive letter, BLM reacted by summarily dismissing the Cotter/Bielski protest, presumably with the intention of issuing the lease to Dohn. This was clearly improper.

[3] This Board is of the opinion that the administrative record strongly indicates multiple violations of 18 U.S.C. § 1001 (1976), which provides:

§ 1001—Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch 645, 62 Stat. 749.)

Two items of correspondence sent by BLM to Dohn at the offices of LCC contained express admonitions that the statute, *supra*, makes it a crime to make false, fictitious, or fraudulent representations to a department or agency of the United States. Moreover, the drawing entry card used by Dohn also bears such an admonition.

There can be no gainsaying that the machine copy of the notarized service contract between Philip H. Dohn, Jr., Lucy Allen Dohn, and Leland Capital Corp. was manufactured for the purpose of submitting it to BLM *after* receipt of BLM's demand for a certified copy of the contract between them at the

time the Dohn offer was filed. This spurious document was then submitted to BLM by LCC, in response to that order, in such a way that it appeared to be a copy of the original one in force when Dohn's offer was filed.

Likewise, there can be no doubt that the spurious contract was falsely notarized. The text of the notary's acknowledgment reads:

COUNTY OF LOS ANGELES,
State of California, ss:

On this day, April 26, 1977, before me, a Notary Public in and for the state of California, Phillip and Lucy Dohn personally appeared and executed this document. Witness my hand and official seal.

/s/ Deborah Lile

Deborah Lile Notary Public

April 26, 1977 [Handwritten Ed.]

Date

OFFICIAL SEAL
DEBORAH LILE
NOTARY PUBLIC-CALIFORNIA
LOS ANGELES COUNTY
My comm. expires AUG 9, 1981¹

Thus, the date "April 26, 1977," was entered *twice* by the notary; once in the typewritten text and again in her own hand below her signature. According to Gleicher's "explanation," these entries are simply errors which, by fantastic coincidence, just happen to agree with the alleged date of the original contract, which date is also typed in the first line of the text of the manufactured specimen.

¹ The typeface utilized in the notary's seal, and the border around it, are not susceptible to accurate reproduction here.

The residence address of the Dohns is shown on the spurious copy of the contract to be Atlanta, Georgia. This raises the question whether they journeyed to Los Angeles, Calif., to sign the "duplicate" of their original contract on Apr. 26, 1978. If they did not do so, does the notary's acknowledgement falsely declare that they personally appeared before her? Could the Dohns' signatures be forgeries? The need to explore these questions is increased by yet another startling fact. Gleicher's letter states that the "duplicate" was executed by the parties and acknowledged by the notary on Apr. 26, 1978, which "coincidentally" happened to be the first anniversary of the original contract executed, allegedly, on Apr. 26, 1977, and through error and inadvertence, all the dates on the 1978 "duplicate" were entered as Apr. 26, 1977, and the word "Duplicate" was omitted, so that the instrument appeared to be a copy of a contract executed in 1977, although it was actually done on Apr. 26, 1978. That date, Apr. 26, 1978, also happens to be the same date that BLM's demand for further evidence was delivered to the LCC offices in Los Angeles. BLM's order to produce the contract was dated Apr. 18, 1978, and was mailed by certified mail, *restricted delivery*, to Lucy Allen Dohn at her "business address," at the offices of Leland Capital. There it was received by someone who signed the postal service's return receipt card "Lucy Allen Dohn by D. Wise," on "4-26-78."

Thus, if we are to believe Gleicher's explanation, *on that same date*: (1) a search was made for the original 1977 contract which could not be found in the business offices of Leland Capital Corp.; (2) a "duplicate" was prepared; (3) Philip H. Dohn, Jr. and (Mrs.) Lucy Allen Dohn, of Atlanta, Georgia, personally appeared in Los Angeles, Calif., were they and the LCC representative [Stephen Z. Flynn?] executed the "duplicate" in the presence of the notary public, Deborah Lile. Lucy Allen Dohn also completed and signed a questionnaire provided by BLM, in which she made various statements of fact concerning the filing of her offer, plus a *third* document, again signed "(Mrs.) Lucy Allen Dohn," in which she declared her "business address" to be that of Leland Capital Corp.

If all of the foregoing events did *not* occur on Apr. 26, 1978, then the incredible "coincidence" of the anniversary date, as described by Gleicher, never occurred, and there is no "explanation" whatever for the submission of a document which purports on its face to be a machine copy of another document allegedly executed *at least* a year earlier, and which did not then exist, according to the affidavits of Cotter and Hall. Interestingly, although the spurious copy of the contract was allegedly prepared and executed, apparently in great haste on the very day BLM's demand was received, Apr. 26, 1978, its submission to BLM was

INTERPRETATION OF SECTION 603 OF THE FEDERAL LAND
POLICY AND MANAGEMENT ACT OF 1976—BUREAU OF LAND
MANAGEMENT (BLM) WILDERNESS STUDY

February 13, 1979

delayed until transmitted by LCC vice president Colacecchi's letter dated May 10, 1978, and received by BLM on May 15, 1978.

The oil and gas lease in question apparently is of substantial value, as indicated by the fact that it attracted 4,902 offers, and according to a statement filed by Tina A. Regan at the time she appealed the rejection of her first-drawn offer. The information and evidence which BLM required was material to its adjudication of which offeror would be awarded the lease, as all concerned were aware. In its adjudication of appeals to determine the rights of parties to receive or preserve interests in Federal lands, this Board has a concomitant obligation to preserve the integrity of the process. We will not turn a blind eye to such strong evidence of willful fraud as is presented by the record in this case. Accordingly, it is the recommendation of this Board that an investigation be initiated to determine whether criminal action should be instigated. *See United States v. Weiss*, 431 F.2d 1402 (10th Cir. 1970).

Therefore, pursuant to the authority delegated to the Board of Lands Appeals by the Secretary of the Interior, 43 CFR 4.1, the dismissal of the Bielski protest is reversed, the oil and gas lease offer NM 30886 of Lucy Allen Dohn is hereby rejected, and the case is remanded with instructions to the

New Mexico State Office to consider the offer of Lee S. Bielski.

EDWARD W. STUEBING,
Administrative Judge.

We CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

JAMES L. BURSKI,
Administrative Judge.

INTERPRETATION OF SECTION 603
OF THE FEDERAL LAND POLICY
AND MANAGEMENT ACT OF
1976—BUREAU OF LAND MAN-
AGEMENT (BLM) WILDERNESS
STUDY

M-36910

February 13, 1979

1. Federal Land Policy and Manage-
ment Act of 1976: Wilderness

Sec. 603 requires the Secretary to study all roadless areas of 5,000 acres or more and roadless islands with wilderness characteristics, and report his recommendations to the President as to the suitability or nonsuitability for preservation as wilderness of each such area. The Secretary may not make multiple-use trade-offs in determining which public land areas qualify for wilderness study status.

2. Federal Land Policy and Manage-
ment Act of 1976: Wilderness

For the purpose of BLM wilderness review, the term "roadless" means the absence of roads which have been improved

and maintained, by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

3. Federal Land Policy and Management Act of 1976: Wilderness

Sec. 603(a) requires that the Secretary report to the President by July 1, 1980, his recommendations as to the suitability for wilderness preservation of all formally identified natural or primitive areas designed prior to Nov. 1, 1975. Only those areas for which a notice of designation was published in the *Federal Register* are subject to this accelerated review and reporting requirement.

4. Federal Land Policy and Management Act of 1976: Wilderness

Sec. 603 of FLPMA does not apply to those areas of the Oregon and California and Coos Bay Wagon Road lands which are being managed for commercial timber production. Sec. 603 does apply to those areas not being managed for commercial timber production.

5. Federal Land Policy and Management Act of 1976: Wilderness

Prior to completion of the initial wilderness inventory and identification of the wilderness study areas, wilderness characteristics must be evaluated before the Secretary authorizes any new activities which would destroy wilderness qualities. Discretionary activities must be conditioned to prevent impairment of an area's potential for wilderness designation.

6. Federal Land Policy and Management Act of 1976: Wilderness

During the review of wilderness study areas, and until Congress acts on the President's recommendations, the Secretary must manage study areas to prevent impairment of their suitability for wilderness designation, with certain limited exceptions.

7. Federal Land Policy and Management Act of 1976: Wilderness

Management of sec. 603 study areas should be guided by the principle that developmental activity must be carefully regulated to insure it is compatible with wilderness, or that its imprint on wilderness is temporary.

8. Federal Land Policy and Management Act of 1976: Wilderness

Sec. 603 provides that mining, grazing, and mineral leasing may continue in wilderness study areas in the same manner and degree as on Oct. 21, 1976, even if impairment of an area's suitability for wilderness results.

9. Federal Land Policy and Management Act of 1976: Wilderness

The words "existing" and "manner and degree" in sec. 603(c) should be read in conjunction with the words "mining and grazing uses" to establish as a benchmark the physical and aesthetic impact a mining or grazing activity was having on an identified or potential wilderness study area on Oct. 21, 1976.

10. Federal Land Policy and Management Act of 1976: Wilderness

The existing mining use exception for mining and mineral leasing is limited geographically by the area of active development, and the logical adjacent continuation of the existing activity, not necessarily the boundary of the particular mining claim or mineral lease on which the operation is located.

11. Federal Land Policy and Management Act of 1976: Wilderness

When the impact from mining and grazing activities on a wilderness study area differs in manner and degree from the impact from such activity on Oct. 21, 1976, the Secretary must regulate the activity to prevent impairment of the area's suitability for preservation as wilderness.

February 13, 1979

12. Federal Land Policy and Management Act of 1976: Wilderness

The word "existing" in sec. 603(c) modifies "mineral leasing" in the same manner as it modifies "mining and grazing uses."

13. Federal Land Policy and Management Act of 1976: Wilderness

The Secretary is vested with the authority and responsibility to regulate all activities in wilderness study areas to prevent unnecessary and undue degradation and to afford environmental protection.

14. Federal Land Policy and Management Act of 1976: Wilderness

Areas under review for designation as wilderness remain available for appropriation under the mining laws, unless withdrawn for reasons other than protection of wilderness.

OPINION BY

OFFICE OF THE SOLICITOR

September 5, 1978

TO: SECRETARY

FROM: SOLICITOR

SUBJECT: BLM WILDERNESS REVIEW—SEC. 603, FEDERAL LAND POLICY AND MANAGEMENT ACT.

I. INTRODUCTION

The Federal Land Policy and Management Act (FLPMA), 90 Stat. 2743, 43 U.S.C.A. § 1701 *et seq.*, (West Supp. 1978) was enacted on Oct. 21, 1976. Beginning in March 1977, several opinions in-

terpreting sec. 603 of the Act, 43 U.S.C.A. § 1782 (West Supp. 1978), have been written in the Office of the Solicitor. This formal Solicitor's Opinion supersedes our previous interpretations of this provision.¹

It does not, of course, answer all the legal questions that are likely to be raised about sec. 603. In particular, we will prepare a separate opinion on the relationship between sec. 603 and state in lieu or state-

¹ The original opinions were contained in the following memoranda:

- Memorandum to the Director, BLM from the Associate Solicitor, DER on "Formally Identified Natural or Primitive Areas," Mar. 22, 1977.
- Memorandum to the Director, BLM from the Assistant Solicitor, Lands on "Applicability of Wilderness Act, Sec. 4(d)(3) to BLM 'wilderness areas,'" May 4, 1977.
- Memorandum to the Director, BLM from the Solicitor on "FLPMA—Interpretation of Sec. 603—Wilderness," May 23, 1977.
- Memorandum to the Director, BLM from the Deputy Solicitor on "Applicability of Sec. 603 of FLPMA to O&C and Coos Bay Wagon Road Lands," June 1, 1977.
- Memorandum to the Assistant Secretary, Land & Water Resources from the Deputy Solicitor on "Interim Management of Potential Wilderness Areas," July 19, 1977.
- Memorandum to the Assistant Secretary, Land & Water Resources from the Solicitor on "Definition of 'road' for purposes of identifying roadless areas under Sec. 603 of the Federal Land Policy and Management Act of 1976 (FLPMA); 43 U.S.C.A. § 1782 (Supp. 1977)," Oct. 17, 1977.
- Memorandum to the Director, BLM from the Deputy Solicitor on "Application of Mining and Grazing Laws to Areas under Review for Inclusion into the Wilderness System: Sec. 603, FLPMA," Jan. 9, 1978.

hood selections of public land, and between sec. 603 and Native selections under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* (Supp. V 1975). But it does chart a general course for interpreting this section.²

Sec. 603 of the FLPMA states:

(a) Within fifteen years after the date of approval of this Act, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by [sec. 201(a)] of this Act as having wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 *et seq.*) and shall from time to time report to the President his recommendation as to the suitability or unsuitability of each such area or island for preservation as wilder-

ness: *Provided*, That prior to any recommendations for the designation of an area as wilderness the Secretary shall cause mineral surveys to be conducted by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present in such areas: *Provided further*, That the Secretary shall report to the President by July 1, 1980, his recommendations on those areas which the Secretary has prior to November 1, 1975, formally identified as natural or primitive areas. The review required by this subsection shall be conducted in accordance with the procedure specified in section 3(d) of the Wilderness Act.

(b) The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendations with respect to designation as wilderness of each such area, together with a map thereof and a definition of its boundaries. Such advice by the President shall be given within two

² For convenient reference, the following is an outline and table of the contents of this opinion:

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years of the receipt of each report from the Secretary. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress.

(c) During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act: *Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 204 of this Act for reasons other than preservation of their wilderness character.* Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated areas, including mineral surveys required by section 4(d)(2) of the Wilderness Act, and mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants.

The legislative history reveals that the wilderness review provision was included in FLPMA to further

the purpose underlying the Wilderness Act, 16 U.S.C. § 1131 *et seq.* (1970), by mandating a review of the public lands for wilderness values and giving Congress an opportunity to act to protect appropriate areas of the public lands.

The Wilderness Act itself specifically directed the Forest Service to review only those areas previously classified as primitive areas or contiguous to existing primitive areas.³ It was silent on review of Forest Service roadless areas outside of primitive areas. The Secretary of Agriculture thereafter directed the Forest Service to institute an inventory of all its lands to identify other areas suitable for inclusion in the National Wilderness Preservation system.⁴ The first Forest Service roadless area review (RARE I) began in 1967 and ended in 1973. This review generated considerable controversy and some litigation about appropriate wilderness review criteria and procedures.⁵ A second review (RARE II) was instituted in 1977 and is nearing completion. Although the Forest Service's RARE provides a backdrop for the wilderness review pro-

³ See *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971), *cert. den. sub nom. Kaibab Industries v. Parker*, 405 U.S. 989 (1972).

⁴ See McCloskey, "The Wilderness Act of 1964: Its Background and Meaning," 45 Oregon L. Rev. 288 (1966).

⁵ *Sierra Club v. Butz*, Civil No. C-72-1455; 3 Env. L. Rep. 20071, (N.D. Cal. 1972); *Wyoming Outdoor Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973). See Robinson, "Wilderness: The Last Frontier," 59 Minn. L. Rev. 1, (1974).

vision of FLPMA, it is plain from sec. 603 that Congress intended to vest BLM with a distinct review obligation of its own.

The introductory language of the Wilderness Act refers to all Federal lands. The Act itself, however, establishes wilderness review requirements only for Department of the Interior-managed lands within National Parks, Wildlife Refuges, and Game Ranges.⁶ Despite the lack of express statutory authority, the Secretary set aside by administrative action certain public lands as "primitive areas," and management of these areas was virtually the same as for lands formally a part of the National Wilderness Preservation System.⁷ At least one such primitive area designation was challenged as invalid because of the lack of an affirmative statutory base, but the court never reached the merits.⁸

Congress' response to the recognized need for a comprehensive public lands wilderness review is FLPMA's sec. 603. It supplies the affirmative statutory base for review and protection of BLM-managed lands suitable for designation as wilderness, in accordance with the provisions of the Wilderness Act.⁹ The review it mandates is designed to further the objectives of

the Wilderness Act itself, 16 U.S.C. § 1131 *et seq.* (1970). Yet there is neither a substantial overlap, nor a substantial inconsistency, between the review mandated by sec. 603 and the Wilderness Act. Specifically, although the latter contains a limited review provision, it is principally concerned with the management of wilderness areas once they have been designated by Congress. It does not deal directly with the obligations addressed in sec. 603—the review of BLM lands for wilderness values. And its own limited review provisions do not spell out in nearly the detail that sec. 603 does the review procedures to be followed, and the management protections BLM must provide for areas being inventoried and studied for possible Congressional protection as wilderness. Therefore, while we are aided by the Wilderness Act and the history of its implementation in our search for the proper interpretation of sec. 603, it goes without saying that it is the language and legislative history of sec. 603 itself, enacted 12 years after the Wilderness Act, which must ultimately control.

II. REVIEW PROCEDURES

The wilderness review mandated by sec. 603 of FLPMA is basically a two-step process. The first step is an identification of roadless areas of 5,000 acres or more and roadless islands having wilderness characteristics through the inventory process mandated by sec. 201 of the Act. The Act envisions a profes-

⁶ 16 U.S.C. §§ 1132(b) and (c) (1970).

⁷ See 43 CFR Part 2070 and Subpart 6221; Foster, "Bureau of Land Management Primitive Areas—Are They Counterfeit Wilderness," 16 Natural Resources J. 621 (1976).

⁸ *F. H. Stoltze Land & Lumber Co. v. Kleppe*, Civ. No. 75-136-M (D. Mont., June 10, 1977).

⁹ See S. Rep. No. 583, 94th Cong., 1st Sess., 44 (1976).

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sional review of all BLM lands to determine which areas meet the three threshold criteria for wilderness areas—roadlessness, wilderness characteristics, and size. This review is to be based solely on the roadlessness and wilderness characteristics of the land, not on multiple-use trade-offs and variables. Full formal wilderness studies are required only on inventoried areas of the required size identified as roadless and of wilderness character; that is, the Department does not have to report to Congress on areas which do not meet the basic criteria.

A. "Roadless"

The House Report on the Act¹⁰ states: "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road." This is the principal recorded guidance in the legislative history about the meaning of roadless.¹¹ Congress clearly did not want

to preclude consideration of an area for wilderness solely because of tracks created by the repeated passage of vehicles alone, and this expression must guide BLM's determination of roadlessness as part of the inventory.

B. "Wilderness Characteristics"

The meaning of "wilderness characteristics" is not discussed in the legislative history, but the text of sec. 603 itself refers to "having wilderness characteristics described in the Wilderness Act * * *." ¹² Sec. 2(c) of that Act¹³ defines a wilderness as follows:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected pri-

¹⁰ H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976).

¹¹ The transcript of the House Committee markup session reveals that Congressman Steiger of Ariz. suggested the definition of "road" which appears in the House Report. Ariz. is an arid state where "ways" can be created and used as roads merely by the passage of vehicles, and Congressman Steiger took some pains to draw the distinction between a "way" and a "road" for wilderness purposes. The latter, he insisted, was any access route improved or maintained in any way, such as by grading, placing of culverts,

making of bar ditches, etc. His express intent was to draw a distinction between what the BLM should do and what the Forest Service had done under the Wilderness Act of 1964, and Congressman (now Senator) Melcher of Montana invited him to submit language for the Committee Report to make the Committee's intent clear. See *Transcript of Proceedings, Subcommittee on Public Lands of House Committee on Interior and Insular Affairs*, Sept. 22, 1975, pp. 329-33.

¹² 43 U.S.C.A. § 1702(i) (West Supp. 1978), which defines "wilderness" as it is used in § 603 as having "the same meaning as it does in sec. 2(c) of the Wilderness Act * * *."

¹³ 16 U.S.C. § 1131(c) (1970).

marily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological or other features of scientific, educational, scenic, or historical values.

C. "Suitability"

Following completion of the inventory, sec. 603(a) next requires the Secretary to study the suitability of the inventoried roadless areas for inclusion in the Wilderness System. At this point, multiple-use trade-offs addressed by the BLM planning system come into play. Congress envisioned that an area with all of the necessary wilderness characteristics might not be suitable for inclusion in the Wilderness System because of its higher value for some other use, such as commercial forest management or mineral development. In fact, before the Secretary can recommend that an area be included in the Wilderness System, Congress directed the Secretary to "cause mineral surveys to be conducted by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present in such areas * * *." ¹⁴ The formal wilderness suitability study must also be conducted in accordance with sec. 3(d) of the Wilderness Act, 16 U.S.C. § 1132(d) (1970), regarding public participation.¹⁵

D. Report to Congress

After studying each area, the Secretary reports to the President his recommendation as to the "suitability or nonsuitability of each such area * * * for preservation as wilderness."¹⁶ The President in turn must advise Congress of his recommendation on each such area, within two years of receipt of the recommendation of the Secretary.¹⁷ Essentially, the Secretary and the President merely advise Congress, since only Congress can designate wilderness areas.¹⁸ Reports must be made to Congress both on areas recommended for inclusion in the wilderness system and on areas viewed as unsuitable and therefore not recommended for inclusion.

E. "Instant" Study Areas

Sec. 603(a) requires that the Secretary report to the President by July 1, 1980, his recommendations on areas which were formally identified as natural or primitive areas prior to Nov. 1, 1975. This accelerated review provision is derived from the House version of FLPMA. The House Report ¹⁹ lists 13 formally designated primitive and natural areas. In fact, the Bureau has, through withdrawals, classifications and other means, created approximately 147 natural areas. Fifty-six of these areas were created by publishing a final notice in the *Federal*

¹⁴ § 603(a), first proviso.

¹⁵ § 603(b).

¹⁶ The last sentence of § 603(b) states: "A recommendation of the President for designation as wilderness shall become effective only if so provided by an act of Congress."

¹⁷ H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17-18 (1976).

¹⁴ § 603(a), first proviso.

¹⁵ § 603(a), last sentence.

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Register with natural area management as the stated purpose, objective or title.

According to BLM procedures for designation of primitive and natural areas, publication of notice in the *Federal Register* completes the process of formal designation. (BLM Manual, Part 2070) Therefore, only natural and primitive areas for which a *Federal Register* notice was published will be considered "formally identified" for the purpose of accelerated wilderness review.²⁰

F. Special Exemptions and Exceptions

The wilderness review requirements of sec. 603 do not or may not uniformly apply to all BLM-managed lands.

1. *Islands*. Although sec. 603(a) generally requires that only roadless areas 5,000 acres or larger be studied, it also requires that all roadless islands, no matter what their size, must be studied. Even though there are over 5,000 public land islands in the East and Midwest, most of which average only an acre in size, each one which is roadless must be evaluated to determine whether it has wilderness characteristics.

2. *O&C Lands*. Sec. 603 has limited application to the Oregon and California Railroad and Coos Bay

Wagon Road revested lands (the so-called "O&C Lands"). This exception is created by sec. 701 (b) of FLPMA, which provides as follows:

(b) Notwithstanding any provision of this Act, in the event of conflict with or inconsistency between this Act and the Acts of August 28, 1937 (50 Stat. 874; 43 U.S.C. 1181a-1181j), and May 24, 1939 (53 Stat. 753), insofar as they relate to management of timber resources, and disposition of revenues from lands and resources, the latter Acts shall prevail.

The legislative history of FLPMA sheds little light on the reason for the inclusion of this specific reference to the O&C Act of Aug. 28, 1937, in this section.²¹

²¹ The language first appeared in Committee Print No. 5 of H.R. 5441 (93d Cong., 2d Sess. 1975), but was not discussed during the Committee mark-up of the print. The language was retained in H.R. 13777 when it was introduced in the 94th Congress. S. 507, the Senate bill which ultimately became FLPMA, made no reference to resolution of inconsistencies between FLPMA and the O&C Act. Although the House provision was included in the Conference Committee print, it was not discussed during meetings of the Conference Committee, nor mentioned in its report. H. Rep. No. 1724, 94th Cong., 2d Sess. (1976).

The effect of this provision was discussed by members of Congress and the Department during consideration of earlier proposals. The Dept. of the Interior, in both letters and testimony at Subcommittee hearings, sought to assure the Oregon delegation that the BLM Organic Act would not affect the funding formula or management of the O&C lands. See Hearings on S. 424 before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 93d Cong., 1st Sess. at 44-45 (1973) and letter from Asst. Secretary Loesch to Senator Hatfield, Sept. 15, 1972. It is not clear, however, whether the language first included in the 1975 version of the House bill derived from this earlier testimony and correspondence.

²⁰ Applying this standard, the natural and primitive areas subject to the accelerated review requirement are listed in Appendix A to this opinion.

But the terms of sec. 701(b) are clear; wilderness review and identification under sec. 603 of the Act are applicable to the O & C lands only to the extent that wilderness review and management of O & C lands for wilderness is consistent with the O & C Act of Aug. 28, 1937. Sec. 1 of the O & C Act provides as follows:

Notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and re-conveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber, *shall be managed*, except as provided in section 1181c of this title, *for permanent forest production*, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities [sic].

(43 U.S.C. § 1181a (1970), (Italics added).)

This Act mandates dominant use management of the O & C lands for commercial forestry.²² Rather than allowing equal consideration of all land uses, the O & C Act requires that the lands suitable for commercial forestry be managed principally for that purpose. Other uses,

such as recreation, are allowed only when subordinated to commercial forest management.

In order to determine whether wilderness review and management is consistent with the O & C Act, we must determine whether dominant commercial forest management is consistent with the mandatory wilderness review required by sec. 603 of FLPMA. It is settled that timber may not be harvested on lands under review for wilderness designation except in very limited circumstances. *Parker v. United States*, 448 F. 2d 793 (10th Cir. 1971); *see also* 36 CFR 293.6 (1976). If sec. 603 applied to the O & C lands, timber could not be harvested until the wilderness review of qualifying roadless areas was completed. Wilderness review of areas on the O & C lands which are managed for commercial timber production is inconsistent with the O & C Act and, therefore, the O & C Act must prevail where the mandatory wilderness review provision of sec. 603 would prevent commercial timber management on the O & C lands.

Congress has recognized, however, that some O & C lands might be unsuitable for timber production. Sec. 701(b) of FLPMA requires the wilderness review provisions of FLPMA to yield only to the extent they are inconsistent with the management for permanent forest production provided for in the O & C Act. This means that the Bureau is not authorized to take an action which would destroy the wilderness

²² See, e.g., Solicitor's Opinion M-30506, Mar. 9, 1940 (holding that O&C lands could not be withdrawn for inclusion in Oregon Caves National Monument); *see also* Instruction of the Asst. Secretary, Aug. 25, 1941 (holding that the Mining Law of 1872 did not apply to O&C lands).

quality of an area in advance of reviewing the area's wilderness potential, if the action contemplated—for example, constructing a fish hatchery, campground, or road for recreational purposes—is not in an area managed for commercial timber production. If roadless areas unsuitable for commercial forest management are identified on O & C lands, they must be reviewed pursuant to sec. 603.

3. *OCS Lands.* Lands on the Outer Continental Shelf are not considered public lands under FLPMA, and thus the wilderness review provision does not apply to them. 43 U.S.C.A. § 1702(e) (1) (West Supp. 1978).

III. INTERIM MANAGEMENT OF POTENTIAL WILDERNESS AREAS

One of the more difficult judgments required in the wilderness review process is deciding what activities are authorized on lands being evaluated under section 603 prior to final Congressional action either adding them to the National Wilderness Preservation System or returning them to ordinary multiple use management. Congress addressed this problem in sec. 603(c) of FLPMA quoted on page 93 above.

The language of sec. 603(e) reflects Congress' concern that wilderness review interfere with ongoing multiple use management activities

only to the extent necessary to prevent *impairment* of suitability for preservation as wilderness. It allows all management activities to continue, subject only to those constraints necessary to prevent impairment until potential areas are determined not to be roadless or not to have wilderness characteristics, or, for roadless areas with wilderness characteristics, until Congress provides otherwise.²³

It is worth emphasizing that sec. 603(c) provides only interim management direction to the Secretary. Once the review of BLM-administered lands is complete and Congress determines the ultimate management objectives for the lands which are roadless with wilderness characteristics, sec. 603(c) does not restrain the Secretary's general authority to manage BLM lands, except to the extent BLM lands are included in a statutory wilderness area. Thus, any regulation required by sec. 603 is only temporary, pending further Congressional action. An appreciation of the interim nature of sec. 603 is important to a proper understanding of the provision.

A. Management of Areas Prior to Inventory

A threshold question which must be addressed regarding sec. 603(c) is what kind of interim management restrictions should apply to

²³ See H. Rep. No. 94-1165, 94th Cong., 2d Sess. at 17-18 (1976).

areas which could possess, but have not yet been determined to have, roadlessness or wilderness characteristics. That is, to qualify for formal study, an area must (a) be an island or contain 5,000 acres or more; (b) be roadless; and (c) have "wilderness characteristics."²⁴ The question is whether development which would impair the suitability of an area for preservation as wilderness can be permitted in an area before it is determined to be roadless and to have or not have wilderness characteristics.

To state the issue somewhat differently, there is no question that the sec. 603(c) restrictions apply to the identified wilderness review areas. It is also clear that once roadless areas with wilderness characteristics are identified, those areas which lack such characteristics are not subject to the interim management restrictions. The remaining question is how to manage public lands prior to the completion of the initial inventory.²⁵

The first sentence of sec. 603(a) says that the review applies to roadless areas "identified during the inventory required by section 201(a) of this Act as having wilderness

characteristics * * *." The inventory required by sec. 201(a) is a continuous process, in the words of the Act, to be "kept current so as to reflect changes in conditions and to identify new and emerging resources and other values."²⁶ The question thus becomes how to merge this continuing inventory requirement with sec. 603's requirement to study potential wilderness areas for possible congressional protection as wilderness. How, in other words, is the inventory process to be carried out in connection with sec. 603?

If the area covered by the proposed action has already been identified in the inventory process as having (or not having) roads or wilderness characteristic, then there is no problem in applying sec. 603. If the area has not been inventoried for roads and wilderness characteristics, then the question is how to mesh the inventory process with sec. 603.

If the BLM contemplates taking or allowing actions which could impair the suitability of an area for preservation as wilderness without having previously determined whether the area is roadless or has wilderness characteristics, it is obvious that the whole purpose of the wilderness review could be defeated. The agency must make those

²⁴ These determinations need not be made separately and discretely; that is, the presence of "wilderness characteristics" connotes the absence of "roads." Of course, a determination that roads exist in the area will eliminate the need for further inquiry into the presence or absence of wilderness characteristics.

²⁵ The inventory process itself is to have no effect on BLM policies. Sec. 201(a) states, in pertinent part: "The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands."

²⁶ § 201(a); 43 U.S.C.A. § 1711 (West Supp. 1978). Congress recognized that the BLM had for years been conducting inventories of the public lands and their resources, and the § 201(a) inventory requirement was designed to be folded into the existing BLM land use planning system. See, e.g., § 202(d), 43 U.S.C.A. § 1712(d) (West Supp. 1978), referring to land use plans in effect at enactment.

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threshold determinations before taking actions which could make subsequent inventory meaningless. In short, the agency cannot permit the possible wilderness characteristics to be destroyed before those characteristics have been determined to exist. Otherwise, the objective of sec. 603 would be defeated.

This conclusion finds strong support in a decision involving the Wilderness Act itself. In *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970); *aff'd*, 448 F. 2d 793 (10th Cir. 1971), *cert. den. sub nom Kaibab Industries v. Parker*, 405 U.S. 989 (1972), the land at issue adjoined the Gore Range-Eagles Nest Primitive Area in Colorado. The Forest Service had by contract sold the timber on this adjacent land to a private company for harvesting.²⁷ As noted earlier in this opinion, the Wilderness Act did not expressly mandate a wilderness study of this land; the Act required the Forest Service to study only the primitive area itself and make a report to the President. But the Act also stated that:

Nothing herein contained shall limit the President in proposing, * * * the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value. 16 U.S.C. § 1132(b) (1970).

²⁷ The original decision by the Forest Service to harvest the timber in this area was made prior to enactment of the Wilderness Act of 1964. See 309 F. Supp. at 596.

The Court of Appeals began by emphasizing that the general purpose of the Wilderness Act was to acknowledge "the necessity of preserving one factor of our natural environment from the progressive, destructive and hasty inroads of man, usually commercial in nature * * *." 448 F.2d at 795. The Court went on to hold that because the intent of the Wilderness Act was that the President and Congress should have a "meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas," performance of the timber sale contract should be enjoined to preserve the area for Executive and Congressional consideration for wilderness preservation.²⁸

Whenever the BLM contemplates taking or allowing actions which could impair an area's suitability for preservation as wilderness, then, it must first determine whether that area is roadless and has wilderness characteristics. If it does, then the action should be evaluated to determine whether it will necessarily impair the area's suitability for preservation as wilderness, or whether it can be modified or con-

²⁸ *Id.*, at 797. The Court noted that the language and legislative history of the Wilderness Act reflect a "constant reassurance to lumber, grazing and other such interests" that the Act does not affect their legitimate interests. But the Court pointed out that these assurances were directed to statutorily designated wilderness areas rather than to the study of other areas for possible inclusion in the system. *Id.*, at 796.

ditioned so as to avoid such impairment. (See discussion at pp. 102-122 below.) If impairment cannot be avoided, then the action cannot proceed until the 603 study is complete and Congress has acted on the President's recommendation.

I should emphasize that no delay in decisionmaking should result from this conclusion. In most cases BLM would have to prepare an environmental analysis record (EAR) and an environmental impact statement (EIS), if required, on the proposed action.²⁹ The sec. 201(a) inventory of roadless areas with wilderness characteristics referred to in sec. 603 can simply be integrated into those NEPA processes. The EAR/EIS should specifically consider whether the area affected by the proposed action lacks roads and has wilderness characteristics and therefore should be formally studied for protection as wilderness. If that determination is made, the Secretary must study and make recommendations to the President on the suitability or unsuitability of the area for preservation as required, and the interim management guidelines of sec. 603(c) then come into play.

If the inventory process shows that the area in question has roads

or does not have wilderness characteristics, then no formal wilderness study is required and the area is free for ordinary multiple use management. Sec. 603 ceases to have any meaning for these areas from the moment that the BLM makes a determination that the area is not roadless or lacks wilderness characteristics.

B. Grazing, Mining and Mineral Leasing in Areas Under Review

1. *Interim Management—FLPMA and the Wilderness Act.* Congress provided in sec. 603(c) that, during the wilderness review process, and until Congress has provided otherwise:

[T]he Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act: * * *

Congress also provided, in the last sentence of sec. 603(c), that:

Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated areas, including mineral surveys required by section 4(d)(2) of the Wilderness Act, and min-

²⁹ See, e.g., *Minnesota Public Interest Research Group v. Butz*, 498 F. 2d 1314 (8th Cir. 1974); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F. 2d 1244 (10th Cir. 1973); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F. 2d 232 (4th Cir. 1971). In each of these cases, the Courts of Appeal enjoined on-the-ground activities which threatened to impair or destroy wilderness characteristics, prior to the preparation of an EIS.

³⁰ 43 U.S.C.A. § 1782(c) (West Supp. 1978), 90 Stat. 2743, 2785. The subsec. continues: "Provided, That in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection."

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eral development, access, exchange of lands, and ingress and egress for mining claimants and occupants.

The initial question is how to interpret and integrate these two standards—the first of which governs management of areas while they are being studied for possible preservation as wilderness, and the second of which governs management of areas after they have been designated as wilderness.

a. *Legislative History.* The “no impairment” language and the grandfather clause which permits impairment for “existing uses” being conducted in the same “manner and degree,” subject to the Secretary’s other regulatory authorities, were inserted into the Act by the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs in 1975, during the second session of the 93rd Congress. At the time, the Subcommittee was reviewing both H.R. 5441 (the Administration’s bill) and a draft bill prepared by the Subcommittee. Neither H.R. 5441 nor the seventh version of the draft Subcommittee bill contained the “manner and degree” language.³¹ Sec. 312 of the seventh draft bill, captioned “Bureau of Land Management Wilderness Study” simply stated that, “[d]uring the period of review of such areas, the Secretary

shall continue to administer such lands according to his existing authority.”³² Sec. 312 of the eighth version of the draft bill (Sept. 1974) contained the wilderness management language basically as it appeared in the subsequent law. The additional language was inserted at the instigation of Congressman Dellenback, who explained:

* * * the gentleman from Alaska had raised the question what could be done on lands set aside for wilderness purposes. I would propose * * * this additional phrase: During the period of review of such areas, the Secretary shall continue to administer such lands in a manner so as to preserve the wilderness character of each such area; subject only to the continuation of existing mining and grazing uses in the manner and degree in which the same had been conducted.

We are trying to keep the static, [sic] trying to keep the Secretary from changing anything. That is what I had in mind with this particular language.³³

The language was expanded to read “existing mining and grazing uses *and mineral leasing* in the manner and degree in which the same was being conducted on the date of the approval of this Act

³² The draft bill continues: “Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act shall apply with respect to the administration and use of such designated area, including mineral development, in the manner as they apply to national forest wilderness areas.”

³³ Hearings on H.R. 5441 before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, U.S. House of Representatives, 93rd Cong., 2d Sess., Sept. 12, 1975 at 1324.

³¹ The previous six versions of the Subcommittee bill had been amended, revised and incorporated into the seventh version of the draft Subcommittee bill.

* * * (italics added) on Sept. 22, 1975 by an amendment to sec. 312 of the draft Subcommittee Print No. 2. There was no discussion concerning the addition of the term "mineral leasing."³⁴

The language of sec. 603(c) adopted by the House was described in a later House Committee report as follows:

While tracts are under review they are to be managed in a manner to preserve their wilderness character, subject to continuation of existing grazing and mineral uses and appropriation under the mining laws. The Secretary will continue to have authority to prevent unnecessary and undue degradation of the lands, including installation of minimum improvements, such as wildlife habitat and livestock control improvements, where needed for protection or maintenance of the lands and their resources and for continuation of authorized uses.³⁵

The Senate bill, S. 507, as reported from the Senate Committee on Interior and Insular Affairs one year previously was markedly dif-

ferent from the House bill with respect to the direction and authority given to the Secretary to manage BLM lands under review for inclusion into the Wilderness System. Unlike the House bill, S. 507 contained no separate BLM wilderness review section. Instead, S. 507 did not require the Secretary to change his management of BLM administered lands under study for possible wilderness designation:

Areas containing wilderness characteristics as described shall be identified within five years of enactment of this Act * * * *the identification of such areas shall not, of itself, change or prevent change in the management or use of national resources lands.*³⁶

Sec. 103 of S. 507, captioned "Land Use Plans," discussed the Secretary's management authority during the review process in identical terms:

Areas identified pursuant to section 102 as having wilderness characteristics shall be reviewed within fifteen years of enactment of this Act pursuant to the procedures set forth in [the Wilderness Act, 78 Stat. 890, 892-893]: Provided, however, that *such review shall not, of itself, either change or prevent change in the management of use of the national resource lands.*³⁷

The discussion of these sections in the Senate Committee Report indicated a concern with avoiding arbitrary termination of existing activities and allowing new uses, as well as a desire to prevent

³⁴ It should be noted that when "mineral leasing" was added, the remainder of that phrase was changed from the plural "had been conducted" to the singular "was being conducted." One could infer from this that Congress meant the "manner and degree" limitation to apply only to mineral leasing, and not to existing mining and grazing uses, so that the latter arguably could still be allowed even if they changed in "manner" or "degree." This inference is not, however, consistent with the legislative history of sec. 603(c), since "mineral leasing" was added *after* the "manner and degree" language was inserted in the section, and there was no suggestion that a severe limitation on the "manner and degree" formula was intended. The better reading is to attribute it to inadvertent grammatical error.

³⁵ H. Rep. No. 94-1168, 94th Cong., 2d Sess. (1976), p. 17.

³⁶ § 102 of S. 507, entitled "Inventory," (94th Cong., 1st Sess.) (Italics added.)

³⁷ § 103(d), S. 507 (94th Cong., 1st Sess.) (Italics added.)

the foreclosure of wilderness designation by uses prior to completion of the inventory and identification process:

Equity demands that activities of users not be arbitrarily terminated or that the Secretary not be barred from considering and permitting new uses during the lengthy inventory and identification processes * * *. The Committee fully expects that the Secretary, wherever possible, will make management decisions which will insure that no future use or combination of uses which might be discovered as appropriate in the inventory and identification processes—be they wilderness, grazing, recreation, timbering, etc.—will be foreclosed by any use or combination of uses conducted after enactment of S. 507, but prior to the completion of those processes.³⁹

The Senate version's general grant of ordinary discretionary interim management authority to the Secretary is in sharp contrast to the more specific proscriptions supported by the House.⁴⁰ The Conference Committee discussed the con-

flict between the House and Senate bills at some length.⁴⁰ The Conference Committee ultimately adopted the wilderness language contained in sec. 311 of the House bill. The Conference Report does not explain why the conferees selected the House language and no debate on the provision occurred after the Conference in either House.

b. *Discussion.* The Wilderness Act continues the mining and mineral leasing laws in statutorily designated wilderness areas through Dec. 31, 1983. Such mining activities are, however, subject to "such reasonable regulations governing ingress and egress * * * consistent with the use of the land for mineral location and development and exploration * * * and restoration as near as practicable of the surface of the lands * * * as soon as they have served their purpose." Moreover, the mineral leases, permits and licenses must contain "such reasonable stipulations * * * for the protection of the wilderness character of the land

³⁹ S. Rep. No. 94-583, 94th Cong., 1st Sess. pp. 44-45 (1975) (Italics added.)

⁴⁰ As noted above (see Note 25, *supra*), language similar to that in sec. 103 of S. 507 stating that the review "shall not, of itself, either change or prevent change in the management" of the public lands, eventually found its way into FLPMA's sec. 201(a). The language in 201(a), however, refers to the inventory process for all public lands rather than to the review of wilderness study areas, which is how it was used in sec. 103 of S. 507. The general reference in sec. 201(a) to the entire inventory must be read as modified by the specific guidance Congress gave the Secretary regarding wilderness review in sec. 603(c). Otherwise, the first sentence of sec. 603(c) has no meaning. See also pp. 105-111, *infra*.

⁴⁰ For example, Senator Haskell noted, "We don't want people going in [to areas under review for wilderness classification] and increasing the activity during the study period, do we?" Transcript of Proceedings, U.S. Senate Conference Committee on S. 507 at 66 (Sept. 20, 1976). And later during the meeting, Senator Haskell set forth his preference for the House version: "I am in favor of protecting all existing uses [on federal lands under review for wilderness classification], but not expanding them or adding new ones * * *." *Id.* at 68. For a discussion in the Conference Committee on what became sec. 603(c), see pp. 48-71 of the Transcript of Proceedings, U.S. Senate Conference Committee on S. 507 (Sept. 20, 1976).

consistent with the use of the land for the purpose for which they were leased, permitted or licensed." Starting Jan. 1, 1984, all such lands are withdrawn from the mining and mineral leasing laws, subject to valid existing rights.⁴¹

It should be noted that, if BLM lands are added to the National Wilderness Preservation System by Congress, the 1984 withdrawal in the Wilderness Act will apply to them as well,⁴² although Congress can decide to apply a different cut-off date for each area, or even ban all mining in them from the outset.

Because mining claims may be located and mineral leasing may continue for a limited period after land has been designated as wilderness, can we reasonably infer that Congress in sec. 603 (c) intended to regulate mining and mineral leasing differently during the review period prior to Congressional action? The answer to this question is not a simple one although, as will be discussed in more detail below (pp. 109-111), there may be no significant differences in fact between standards to be applied during the two periods in question.

The leading judicial guidance on the subject, the *Parker* case, discussed above at pages 101-102, stands for the proposition that an agency's obligation to protect lands

during the review process must be viewed separately from the agency's obligation to manage lands which are already part of the National Wilderness Preservation System.

Moreover, where Congress in 1976 has established a different standard for allowing control during the interim period, its directions must be carried out even if subsequent Congressional designation of an area as wilderness may actually change the restrictions.

It is worth noting that Congress has twice recently created "wilderness study areas" on the National Forests, in the eastern United States and in Montana.⁴³ These Acts directed the Secretary of Agriculture to review particular designated areas to determine their "suitability or unsuitability for preservation as wilderness * * *" and make recommendations to the President who forwards his or her own recommendations to the Congress. Congress provided, as in FLPMA, that the wilderness areas created by that Act would be managed in accordance with the provisions of the Wilderness Act.

In creating these wilderness study areas, however, Congress also provided that they were to be managed "so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System until Congress has deter-

⁴¹ 16 U.S.C. § 1133(d)(3) (1970).

⁴² The last sentence of § 603(c) provides: "Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act * * * shall apply * * * including * * * mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants."

⁴³ See Public Law No. 93-622, 88 Stat. 2096, 16 U.S.C. § 1132 Note (January 3, 1975), designating wilderness areas and creating seventeen wilderness study areas in the eastern half of the country; and Public Law No. 95-150, 91 Stat. 1243, 16 U.S.C. § 1132 Note (Nov. 1, 1977) § 3.

mined otherwise * * *." Unlike FLPMA, Congress made no exception for existing uses, but simply flatly commanded that the areas' present character be preserved.⁴⁴

When compared to these Acts passed the year before and the year after, FLPMA embodies a less restrictive approach to interim management, expressly protecting existing mining and grazing uses and mineral leasing. Yet all three statutes could be contrasted with the Wilderness Act, which says nothing of interim protection and allows new mining and mineral leasing to occur, subject to appropriate regulation, until 1984 in statutory wilderness areas.

The legislative history of sec. 603 shows that Congress had the clear opportunity to incorporate the minerals management language of the Wilderness Act into sec. 603(c). The Senate-passed version of interim management restrictions accorded wide discretion to the Secretary to allow mining, grazing, and other uses, possibly incompatible with wilderness, during the review process. The Conference Committee, and ultimately the Congress, rejected this approach, and instead adopted the wholly-new interim wilderness protection proposed by the House. This should be compared with sec. 603(a), which expressly incorporates the review procedure

of sec. 3(d) of the Wilderness Act regarding public participation.

Another persuasive indicator of Congress' intent is FLPMA's sec. 302(b), the last sentence of which provides, in pertinent part:

Except as provided in * * * section 603 * * * and in the [following sentence], no * * * section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

The plain import of this partial disclaimer is that sec. 603 might to some degree "amend" the Mining Law or "impair" the rights of claimants under that Act.⁴⁵ Sec. 302 (b) thus underscores the meaning of sec. 603 by expressly recognizing that mining claimants are subject to regulation to carry out the purposes of sec. 603, apart from whatever operations may be allowed once an area becomes a statutory wilderness area.⁴⁶

⁴⁵ The reference to "impairment" of claimants' rights, of course, must be read against § 701(h), which makes all actions of the Secretary under the Act "subject to valid existing rights." 43 U.S.C.A. § 1701, Note (West Supp. (1978)).

⁴⁶ It should also be observed that Congress expressly recognized that the last sentence of § 302(b)—referring to prevention of unnecessary and undue degradation—also may work an amendment to the Mining Law or an impairment of claimants' rights under that law. That sentence is very similar, although not identical, to the *proviso* in the first sentence of § 603(c), discussed at pp. 118-119, *infra*.

⁴⁴ The Montana Act went on to provide that this interim wilderness protection mandate was "subject to valid existing rights."

It should also be noted that in a little more than five years (Dec. 31, 1983), no new mining claim may be located or mineral lease issued in statutory wilderness areas. Because BLM has until 1991 to complete the sec. 603 review, we must be careful in comparing the effect of the two Acts. Specifically, Congressional action on the Executive's recommendations for BLM wilderness may not come in many, if not most cases until after the cutoff date under the Wilderness Act. Thus Congress' directive in the last sentence of sec. 603(c) to manage statutorily designated BLM wilderness areas under the Wilderness Act will probably not mean that new mineral leasing or location of mining claims will be allowed in BLM wilderness areas. Finally, it must be remembered that Congress can, in creating new wilderness areas by statute, require more or less stringent restrictions for any particular wilderness area than exist in the Wilderness Act itself.⁴⁷

It has been suggested that Congress must have intended mineral exploration to continue in wilderness study areas unrestricted by sec. 603 because Congress needs to know whether an area is valuable for minerals in deciding whether to create a wilderness area. This ignores the plain requirement of sec.

603(a) that, "prior to any recommendations for the designation of an area as wilderness," the Secretary must have the USGS and Bureau of Mines make mineral surveys "to determine the mineral values, if any, that may be present in such areas."⁴⁸ The Congress has in effect demanded that it be informed through these surveys about the mineral character of every study area before it makes a decision whether to protect the area as wilderness. If the surveys show mineral potential exists, for example, Congress can order more study to gather more information about mineral potential, or reject the area as wilderness; and mineral surveys must be made on a "planned, recurring basis" once an area is designated as wilderness. Congress retains the opportunity to withdraw statutory protection for wilderness if substantial mineral potential is subsequently determined to exist. (Of course, minerals information gathered through minerals exploration activity carried out consistent with interim management regulation will also be considered by Con-

⁴⁷ For example, the Eastern Wilderness Act specifically authorizes the Secretary of Agriculture to purchase or consider "such lands, waters, or interests therein as he determines are necessary or desirable" to further the management of the areas as wilderness. *See* P.L. No. 93-622, § 6(b); 16 U.S.C. § 1131 (1970), Note.

⁴⁸ This requirement in § 603(a) follows the requirement of § 4(d)(2) of the Wilderness Act, that statutory wilderness areas be "surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present; and the results of such surveys shall be made available to the public and submitted to the President and Congress." 16 U.S.C. § 1133(d)(2) (1970). This § 4(d) requirement is itself expressly incorporated into § 603(c), which provides that the Wilderness Act shall govern once BLM areas are designated as wilderness, "including mineral surveys required by § 4(d)(2) of the Wilderness Act * * *."

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gress in making decisions on each area.)

Given these explicit mechanisms in secs. 603(a) and 603(c) for gathering minerals information, it is obvious that the grandfather clause in 603(c)'s interim protection provision has nothing to do with encouraging mineral exploration so Congress can be better informed when it decides whether to protect an area. Rather, as we shall see below, the grandfather clause in sec. 603(c) has only to do with fairness to those who are currently active in drilling or other forms of mining development (as well as grazing).

The conclusion is inescapable that Congress deliberately chose in sec. 603(c) to direct the Secretary to conform to a specific standard in deciding whether and on what basis to allow development of mining claims and mineral leases in areas being considered for possible protection as wilderness. The treatment of minerals activities in statutory wilderness areas under the Wilderness Act itself provides only limited guidance to the Secretary for interim management. As we shall see in the next section, however, there may not be much difference between interim management of a study area and management of a statutorily designated area.

2. *"Impairment" of the "Suitability" of an Area for Preservation as Wilderness.* The general guidance given to the Secretary for in-

terim management is found in the first sentence of sec. 603(c); namely, that the study areas are to be managed "so as not to impair the suitability of such areas for preservation as wilderness * * *."

Several things can be said about this language. First, clearly any existing or new activity is permissible in a study area if that activity does not impair the suitability of the area for preservation as wilderness. Second, the Wilderness Act itself recognizes that certain activities are incompatible with the preservation of wilderness characteristics, and prohibits these activities in wilderness areas (16 U.S.C. § 1133(c) (1970)):

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

Many of the activities described can occur during the study period if they can be effectively terminated without impairment upon a final designation of the area as wilderness; e.g., temporary use of motorized vehicles, landing of air-

craft, etc. However, the provision also gives guidance to determining activities which will impair the suitability for wilderness designation because such activity would be inconsistent with ultimate wilderness management, and its effects cannot be eliminated easily upon designation of the area as wilderness; e.g., construction of permanent roads.

Third, it should be noted that the Wilderness Act's definition of wilderness, incorporated into FLPMA by sec. 603(a), allows some human intrusions into the wilderness landscape, so long as they are not permanent, and the area "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable * * *." 49 The BLM should be guided in part by the kinds of intrusions and activities which occurred in areas before they were placed by the Congress in the National Wilderness Preservation System.

Fourth, as we have seen (see p. 105, *supra*), in enacting the Wilderness Act in 1964, Congress contemplated that mineral development could take place in some circumstances in statutorily designated wilderness areas.⁵⁰ Almost by defini-

tion this activity could adversely affect wilderness character to some degree,⁵¹ yet Congress has decided that it may be compatible with an area's suitability for preservation as wilderness.

Although Congress has not flatly considered that all developmental activity impairs the suitability of an area for wilderness preservation, it is difficult if not impossible to give meaningful illustrations of types of activities which will or will not impair the suitability of an area for wilderness preservation. For example, commercial timber harvesting has been held to impair⁵² and not necessarily to impair⁵³ wilderness. The nature of the area and the extent of the proposed activity are the controlling factors, and a wise exercise of judgment of land management professionals and Departmental decisionmakers will be required.

Management of sec. 603 wilderness study areas should, therefore,

⁵¹ In *Izaak Walton League of America v. St. Clair*, 353 F. Supp. 698 (D. Minn. 1973), *rev'd* 497 F. 2d 849 (8th Cir. 1974), *cert. denied* 419 U.S. 1009 (1974), the district court held that mineral development is by definition inimical to wilderness. The Court of Appeals reversed, holding that the district court should not have reached the question until the Forest Service had made a decision on defendants' application for a prospecting permit.

⁵² See *Parker v. U.S.*, discussed *supra*, p. 101.

⁵⁰ Although the Wilderness Act contemplates continued mineral leasing and mining claim location in statutory wilderness areas, it is a generally acknowledged fact that mineral development in statutory wilderness areas has been rather limited. One could only speculate about the principal cause of this; possible causes include poor mineral prospects, stringent regulation of proposed mineral operations, and the reluctance of the mining industry to risk adverse public reaction by opening major mining operations in wilderness areas.

⁵³ See *Minnesota Public Interest Research Group v. Butz*, 541 F. 2d 1292 (8th Cir. 1976). This case involved a special section of the Wilderness Act dealing with the Boundary Waters Canoe Area (BWCA) which provided that "the primitive character of the area" is to be maintained "without unnecessary restrictions on other uses, including that of timber * * *." See 16 U.S.C. § 1133(d)(5) (1970). Because of this special provision, the court found that the BWCA occupied a "unique niche" in the National Wilderness System. See 541 F. 2d at 1298.

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be guided by the principle that developmental activity must be carefully regulated to insure it is compatible with wilderness. Congress has, in sec. 603 as in the Wilderness Act, provided for the continuation of certain developmental activities within wilderness study areas. Such development proposals must be carefully regulated to prevent impairment, however, and it is possible that in some circumstances development must be prohibited where impairment cannot be prevented or restored. To the extent that activities and their imprint on wilderness are temporary and can be carried on in a manner calculated to minimize interference with wilderness, these activities pose less of a threat to an area's suitability for wilderness preservation than do activities with long-term impact and low rehabilitation potential.

3. *Existing Uses.* The grandfather clause of sec. 603(c), "for existing mining and grazing uses and mineral leasing,"⁵⁴ will actually have quite limited applicability. Most existing mining uses, for example, already involve roads or such intrusions on the landscape as to destroy an area's wilderness characteristics. Consequently, such areas would not be included in a study area to begin with. Therefore, the grandfather

clause will probably apply to a relatively small number of situations.

And it should also be noted again that an activity which does not fall within the ambit of the grandfather clause—e.g., because it is a "new" rather than an "existing" use—may nevertheless be permitted to take place if its intrusions into an area can be mitigated so as not to impair the suitability of the area for preservation as wilderness. Failing to qualify for the grandfather clause does not necessarily spell the end of the activity in a wilderness study area.

In what follows, I set forth what I believe to be the proper interpretation of each key phrase in the clause.

a. *"Mining and grazing."* I conclude that "existing mining and grazing uses" means only activities actually taking place as of the date of the passage of FLPMA. Indeed, any other reading is difficult given the employment of the word "use" rather than "entitlement to use" or "right to use."⁵⁵ Any other interpretation would also be inconsistent with the adjective "existing," and the verb "was being conducted,"

⁵⁴ The term "grandfather" in this context refers to protection of existing uses in the "subject, however, to the continuation of" clause. As will be discussed below, it does not exempt even existing uses from any regulation, because of the *proviso* immediately following. See pp. 116–119, *infra*.

⁵⁵ The dictionary defines "use" in several ways, including "the act or practice of using something * * * method or manner of using something * * * a habitual or customary practice * * * a privilege or benefit of using something * * * the ability or power to use something (as a limb or a faculty) * * * the legal enjoyment of property that consists in its employment, occupation, exercise, or practice * * * the quality of being suitable for employment." See *Webster's Third New International Dictionary* (Unabridged) (G. & C. Merriam Co., 1961).

and is also inconsistent with the legislative history of the section.

Also, if there was no "use" actually being made of a lease or claim as of the date of enactment, there is simply no benchmark of comparison of the "manner and degree" of the post-FLPMA use with the use as of enactment. Expressed another way, the "manner and degree" of pre-FLPMA use, if there were none, means that *any* new use is not of the same "manner and degree" and must be regulated so as not to impair suitability for preservation as wilderness. In this sense, then, "existing use" and "manner and degree" dovetail and point toward actual use.

I conclude, then, that Congress' intent was to grandfather *actual uses* of a particular area as they existed on the date of passage of the Act, rather than to protect uses initiated or expanded after the Act passed without regard to their impact on wilderness. Expressed another way, its objective was to protect actual, ongoing activities from curtailment solely for wilderness protection purposes, rather than to grant a blanket exemption for particular kinds or categories of uses or legal entitlements.

This means specifically that if a mining claim was previously located in a wilderness study area, but was not being actively worked (except for annual assessment work), work cannot be initiated or resumed after passage of FLPMA without being subject to such regulations as the Secretary deems necessary to

protect the area's wilderness characteristics from impairment. Similarly, a mineral lease on which there was no on-the-ground activity could not qualify for the "existing use" grandfather. It is, in other words, the actual use of the area, and not the existence of some presumed entitlement for use, which is controlling.

Following similar reasoning, I believe the existing mining use exception for mining and mineral leasing is limited geographically by the area of active development, and the logical adjacent continuation of the existing activity. This is not necessarily the boundary of the particular mining claim or mineral lease embracing an actual mining operation. More than one mining claim or mineral lease may be included under the umbrella of "existing use" if they are embraced in an actual operation as of the date of the passage of FLPMA. Nonadjacent activities on claims or leases would not qualify as part of the same "existing use."⁶⁶ Any claims or leases not actually being worked or not logically a continuation of an ongoing operation are subject to regulation in order to protect the area's wilderness characteristics.

⁶⁶ In determining what is adjacent activity, as in other determinations made in implementing § 603, a "rule of reason" must be followed. For example, an oil or gas well drilled a quarter-mile away from an area impacted by the existing development could be considered "adjacent," while a well drilled five miles from the area impacted by the existing well site would ordinarily not be. Of course, topography and other site-specific characteristics would ultimately control.

I note that this conclusion is somewhat different from the conclusion stated by the Deputy Solicitor in his Jan. 8, 1978 opinion, at p. 9, which stated that the existing use is limited geographically by the boundary of a particular mining claim embraced in an actual mining operation. Upon further reflection, I have determined that the legal boundary of a claim or lease should not control what Congress meant by an "existing use." Instead, I believe Congress intended to allow existing operations to continue across lease or claim boundary lines onto immediately adjacent claims or leases if (a) operations were actually being conducted when FLPMA became law, and (b) the operations continued in the same "manner and degree" as before.

(i) Mineral assessment work

The Mining Law of 1872 requires that a mining claimant perform annual assessment work on his unpatented mining claim.⁵⁷ Failure to perform assessment work causes the claim to be subject to relocation by another.⁵⁸ It also constitutes grounds for an action to cancel by the United States.⁵⁹

It seems obvious that the necessary assessment work can and should be considered an "existing mining * * * use" entitled to con-

tinuation.⁶⁰ It is, of course, subject to regulation both to the extent it differs in "manner and degree" from how it was being conducted on the date of approval of the Act (discussed at pp. 114-115, below) and to the extent it unnecessarily or unduly degrades the lands or resources involved, or the environment (discussed at pp. 116-119, below). The extent of the Secretary's power to regulate in this context will be discussed in more detail below (pp. 118-122).

b. "Mineral Leasing". Congress' reference to "mineral leasing" in sec. 603(c) is ambiguous.

Viewed in one literal way, Congress has provided for the "continuation of * * * mineral leasing in the manner and degree in which [it] was being conducted" at enactment. Although this is a possible reading of the phrase, its effect would be to repeal the Secretary's traditional statutory discretion to lease minerals,⁶¹ and instead man-

⁵⁷ Of course, where no assessment work has been done in the past (which makes the claim voidable but not void), the "existing use" exception would not apply, since there was no existing use. When a claimant proposes to do assessment work when it had not been done when FLPMA became law, the assessment work itself is subject to regulation so as not to impair the suitability of the area for preservation as wilderness.

⁶¹ Numerous cases have emphasized the plenary authority of the Secretary to refuse to issue leases when he considers such issuance contrary to the public interest. See, e.g., *Udall v. Tallman*, 380 U.S. 1, 4 (1965); *Duesting v. Udall*, 350 F. 2d 748 (D.C. Cir. 1965); *T. R. Young, Jr.*, 20 IBLA 333 (1975).

⁵⁷ R.S. § 2324, 30 U.S.C. § 28 (1970).

⁵⁸ R.S. § 2324, 30 U.S.C. § 28 (1970).

⁵⁹ 43 CFR 3851.3(a). See *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970).

date mineral leasing in wilderness study areas presumably at the rate and on the same terms ("manner and degree") as had been done at enactment. The Secretary would have no authority to refuse to issue or renew such leases either to preserve an area's wilderness suitability or for any other reason—except where renewals or issuance of new leases differ in "manner and degree" from prior leasing.

There is no indication in the legislative history that this rather extraordinary result was intended.⁶² Furthermore, Congress expressly provided that FLPMA works no "repeals by implication."⁶³ Therefore, I conclude that Congress did not intend to strip the Secretary of the discretion it has traditionally accorded him with respect to mineral leasing.

This conclusion does not solve all the ambiguity in the "mineral leasing" reference. Even assuming that Congress was referring to mineral leases rather than a continuing pattern of mineral leasing, the question then is whether Congress meant to grandfather the leases themselves, regardless of whether operations were being conducted on them on Oct. 21, 1976, or only to grandfather those operations actually being conducted on Oct. 21, 1976 on those leases.

On the one hand, the separate reference in sec. 603(c) to "mineral leasing" as well as to "mining uses"

suggests that Congress intended to grandfather the leases themselves—rather than simply the operations on those leases.

On the other hand, the House Committee Report on the House version, which eventually became sec. 603(c) in the final bill, describes Congress' intent as to grandfather "existing * * * mineral uses" rather than all activities on existing mineral leases, regardless of whether they were underway by Oct. 21, 1976, when FLPMA became law.⁶⁴ Specifically, the Committee Report's reference to "existing mineral uses," as well as "appropriation under the mining laws," strongly suggests that the separate reference to "mineral leasing" was added to sec. 603(c) simply to clarify that "existing mining * * * uses" covered activities carried out under the mineral leasing laws as well as under the mining laws. The mere issuance of a mineral lease has no impact on an area's wilderness characteristics—it is operations conducted pursuant to a lease which can impair the suitability of an area for preservation as wilderness.

At bottom the question reduces itself to a determination whether Congress used the words "mineral leasing" as a use actually taking place on the public lands, or more broadly as a legal entitlement by which a lessee would be allowed to conduct mining operations on the land irrespective of whether or not the operations would impair the

⁶² See p. 103-104, *supra*, esp. Note 33.

⁶³ See § 701(f), 43 U.S.C.A. § 1701 (West Supp 1978) note.

⁶⁴ See H. Rep. No. 94-1163, 94th Cong., 2d Sess., p. 17 (1976), discussed at p. 104, *supra*.

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suitability of the area for wilderness designation. I have already concluded that "mining * * * use" refers to actual operations rather than a legal entitlement. I conclude the Congress intended the same result for mineral leasing.

Limiting the grandfather clause's operation to drilling and other operations actually taking place on mineral leases on Oct. 21, 1976, does not mean that additional activity on existing mineral leases is prohibited. Rather, exploration and development operations can continue in the manner and degree that such activity was being conducted on Oct. 21, 1976, including the drilling of new wells within the guidelines discussed above at pp. 109-113, and, of course, increased activity can occur subject to regulation by the Secretary to the extent necessary to preserve the area's suitability for preservation as wilderness.

Similarly, existing leases may be renewed or new ones issued so long as they are made subject to appropriate regulations, lease stipulations and other safeguards designed to prevent operations under the lease from impairing the area's suitability for preservation as wilderness.⁶⁵

⁶⁵ For the Department's view on an analogous issue involving wilderness study areas in National Forests, see *Edras K. Hartley*, 23 IBLA 102 (1975) where the Board of Land Appeals held that the BLM must make a case-by-case review of whether and under what conditions mineral leasing is appropriate in such a wilderness study area.

(i) Preference right leases

Preference right leases pose no special problem. A preference right lease applicant who makes the necessary statutory showing⁶⁶ and otherwise complies with statutory requirements⁶⁷ is entitled to a preference right lease.⁶⁸ Yet the Secretary concededly has wide discretion, and a duty, to include lease terms adequate to protect the environment.⁶⁹ The lease terms must include appropriate measures to prevent impairment of the area's suitability for preservation as wilderness. See also Part III(B)(6) at pp. 118-119, below.

4. "*Manner and Degree*". The next question is how to interpret the phrase "manner and degree." I believe this is properly read in tandem with the word "existing," to qualify the Secretary's authority to manage the public lands under review in order to preserve their wilderness characteristics. That is, "existing" and "manner and degree" establish as a benchmark the physical (including aesthetic⁷⁰) impact a min-

⁶⁶ "Commercial quantities" of coal, or a "valuable deposit" of phosphate and other leasable minerals. See 43 CFR 3520.1-1 (1977).

⁶⁷ See 84 I.D. 442 (1977) ("unclaimed/undeveloped" opinion).

⁶⁸ See *NRDC v. Berkland*, — F. Supp. — (D.D.C. 1978); appeal pending, No. 78-1757 (D.C. Cir.).

⁶⁹ *Ibid.*

⁷⁰ The "manner and degree" language must be read against the backdrop of the definition of wilderness in the Wilderness Act, which Congress specifically incorporated into § 603 (a). See pp. 94-96, *supra*. That definition

(Continued)

ing or grazing activity existing on Oct. 21, 1976 was having on the area in question on that date. Any change in use or uses, or any change in the rate of use, which would alter the physical impact on the area is subject to regulation in order to preserve wilderness characteristics. Of course, it is only the *physical* and *aesthetic* impact caused by the use and not the use itself which need be measured, for it is the use's impact on the land which could impair the suitability of an area for wilderness.⁷¹ In assessing the physical impact of existing uses, a rule of reason must be followed.⁷² It bears reiteration that it is the physical impact on a study area by all uses, including mining or grazing, which sec. 603 directs the Secretary to regulate.

Except for the *proviso* regarding "unnecessary or undue degradation" and "environmental protection," the Secretary is directed under sec. 603 to regulate only those uses that may impair wilderness characteristics of lands under review. In this regard, the "manner and degree" qualification on the

Secretary's authority does not, for example, necessarily fix as an upper limit the exact number of cattle currently grazing in an area. If more cattle could graze there without having any more impact on an area's wilderness suitability, or without unduly or unnecessarily degrading the land or resources, or harming the environment, then sec. 603 would permit the Secretary to allow the additional cattle to graze. If the physical impact is increased, however, the activity must be regulated to the extent necessary to prevent impairment of the area's wilderness suitability.

5. "*Valid Existing Rights.*" Sec. 701(h) of FLPMA, 43 U.S.C.A. § 1701(h) (West Supp. 1978), states that, "All actions by the Secretary concerned under this Act shall be subject to valid existing rights." Mineral leases, mining claims and grazing permits all grant varying rights and privileges and these rights and privileges cannot be taken pursuant to sec. 603 or any other section of FLPMA. The degree to which sec. 603 authorizes regulation of valid existing rights to protect wilderness suitability is thus bounded by the fact that these rights must not be condemned or taken.

The degree to which FLPMA allows regulation of the exercise of these rights and privileges without "taking" them in the constitutional sense is a complex one which can be addressed only in concrete cases. We can, however, discuss the pertinent line of inquiry. The first question is

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speaks of the aesthetic of wilderness; e.g., "untrammelled by man," "primeval character or influence," "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable."

⁷¹ Thus extracting 5 tons of ore by pick, shovel and mule should have far less impact than extracting the same amount by bulldozing, blasting and trucking. Similarly, extracting 5 tons of ore per year has far less impact than extracting 500 tons per year.

⁷² Thus the difference between 35 and 40 cows grazing, or between 190 and 200 tons of ore being extracted, would ordinarily be insignificant.

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the nature of the "right" held by the lessee, permittee, or mining claimant. A lease may contain an absolute right to develop or a qualified right.

An absolute right to develop is not subject to defeasance by sec. 603(c), or anything else. Yet such absolute rights are rare, if they exist at all. Most permits and mineral leases, especially those issued in recent years, qualify the holder's right to develop in various ways.

Mineral leases typically issued by the Department in modern times, for example, require the lessee to comply with the Department's rules and regulations in effect on the date of the lease, *and* those which are duly adopted thereafter. This is a major limitation on the right of the lessee, and accordingly, limits the protection provided by sec. 701(h).

As noted earlier, holders of prospecting permits under the Mineral Leasing Act also have a right to a lease under certain circumstances.⁷³ Yet that right is subject to compliance with applicable regulations and the Secretary may make the lease itself subject to appropriate terms and conditions to carry out his overall duty to manage public resources in the public interest, as well as his specific duties under such statutes as FLPMA, and particularly sec. 603.

Similarly, the right of the holder of a mining claim is subject to the Secretary's power to issue regulations to govern operations on these claims,⁷⁴ and the Secretary's authority pursuant to sec. 302(b) of FLPMA to regulate operations on, and access to, mining claims, and to "prevent unnecessary or undue degradation" of the public lands.⁷⁵ And finally, a mining claim is obviously a valid "right" only if it is a valid, properly maintained mining claim.

The rights of grazing permittees are also qualified by the terms of the permit and the Secretary's regulations on the subject.⁷⁶

It is, then, impossible to generalize about the effect of sec. 701(h) on regulation to protect wilderness suitability under sec. 603(c). Each claim, permit or lease must be examined to determine the nature of the rights conveyed by the United States, and the nature of the impairment of that right proposed to protect an area's wilderness suitability.

Finally, it deserves emphasis that the exercise of a right may be regulated without the right being "taken" in a constitutional sense. That is, although property rights may not be taken under the Fifth Amendment to the United States Constitution without compensation, the United States Supreme

⁷³ See p. 114-115, *supra*.

⁷⁴ See 30 U.S.C. § 22 (1970).

⁷⁵ See pp. 118-119, *infra*.

⁷⁶ See 43 CFR Part 4100.

Court has made clear on many occasions that the exercise of such rights may be regulated and to some extent impaired in furtherance of a proper governmental purpose without effecting a constitutional "taking," requiring compensation." Sec. 701 (g), then, must be read as prohibiting the Secretary from taking "valid existing rights," but not from regulating the exercise of that right in order to carry out sec. 603's purposes.

6. *Preventing "Unnecessary or Undue Degradation" and "Afford[ing] Environmental Protection".* The grandfather clause relating to existing mining and grazing uses and mineral leasing is an exception from the general direction in section 603 to manage wilderness candidate lands "so as not to impair the suitability of such areas for preservation as wilderness."

It is clear, then, that if the level of physical impairment caused to an area by mining and grazing differs in "manner and degree" from the existing level of physical impact, it must be regulated to the extent necessary to prevent impairment of the area's wilderness suitability. Except for that specific qualification imposed on the Secretary's authority by the words "existing" and "manner and degree," sec. 603

directs the Secretary to regulate existing uses of BLM-administered lands under review in order to preserve their wilderness characteristics. To take a simple example, a miner who was using a pickaxe and burro on Oct. 21, 1976, to extract one ton of ore a year may not begin using a bulldozer and explosives thereafter to extract 100 tons a year in a wilderness study area unless these activities are subject to appropriate regulation, assuming that the greater activity might impair the suitability of the area for wilderness.

Sec. 603(c) contains a *proviso* stating:

That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

This *proviso* modifies both preceding clauses of the sentence: the new use nonimpairment clause, and the existing listed use exemption from nonimpairment.⁷⁸

It should be noted that the *proviso* does not refer to protection of wilderness characteristics. Rather, it refers to degradation of the lands, resources, and "environmental protection." The *proviso* is, however, part of the same sentence as, and therefore qualifies, the grandfather

⁷⁷ See, e.g., *Penn Central Transp. Co. v. City of New York*, — U.S. —, 98 S. Ct. 2646 (1978); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); Sax, "Takings and the Police Power," 74 Yale L.J. 36 (1963); Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundation of 'Just Compensation' Law," 80 Harv. L. Rev. 1165 (1967).

⁷⁸ A nearly identical sentence appears earlier in FLPMA, in § 302(b), see 43 U.S.C.A. § 1732(b) (West Supp. 1978): "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." The sentence in 603(c) adds to this the words "or their resources or to afford environmental protection."

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clause for existing mining and grazing uses and mineral leasing.

The effect of the *proviso* on the grandfather clause is therefore unclear; i.e., how should the Secretary carry out his mandates of protecting the lands and resources from unnecessary and undue degradation; and protecting the environment, consistent with the grandfather clause?

I believe that the *proviso* authorizes regulation of activities for reasons other than their impact on wilderness suitability. That is, I conclude that if an existing mining or grazing use is already impairing an area's wilderness qualities, this *proviso* does not supply the Secretary with authority to regulate it solely to preserve wilderness suitability. It does, however, vest the Secretary with authority to regulate these activities to prevent unnecessary and undue degradation and to protect the environment.

To take a specific example, if on Oct. 21, 1976, a miner was using motorized vehicles, explosives, and drilling equipment to explore for hardrock minerals on a particular mining claim, the Secretary may not now restrict the manner and degree of the miner's activities solely in order to preserve wilderness characteristics. But if the blasing or other activities being conducted are causing undue or unnecessary degradation to the lands, they can be regulated to prevent that kind of degrada-

tion. That kind of regulation cannot be undertaken to protect an area's suitability for wilderness preservation, although the effect of the regulation may incidentally help preserve that suitability.

It may be a fine and perhaps impossible line to draw between preventing environmental damage or undue or unnecessary degradation of the public lands and resources on the one hand, and allowing ongoing activities to continue despite wilderness impairment on the other. In some cases, in fact, the purposes may overlap. In such cases, FLPMA as a whole stands foursquare for the notion that uses of the public lands and resources should be regulated to protect the environment and prevent undue or unnecessary damage. A miner, for example, does not have the right to continue to engage in poor mining or reclamation practices which cause, for example, unnecessary degradation or pollution if that's what he was doing on Oct. 21, 1976. The grandfather clause cannot be construed to extend that far.

7. *Appropriation of Lands Under the Mining Laws.* As I pointed out earlier, elsewhere in FLPMA Congress in effect amended the Mining Law so that the Secretary could discharge his obligations under sec. 603. That section states, in appropriate part:

*Except as provided in * * * section 603 * * * no * * * section of this Act shall*

in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under the Act, including, but not limited to, rights of ingress and egress.⁷⁸

Under the Mining Law, the Secretary has the authority to regulate the conduct of operations on mining claims, but the specific authorization in the portions of 302(b) quoted above and 603(c) of FLPMA makes it clear that he can regulate activities carried out pursuant to those claims for the sole purpose of protecting wilderness characteristics (except for existing uses).

But, while directing the Secretary to regulate mining uses, Congress at the same time prohibited the Secretary from withdrawing any of the wilderness study lands from appropriation under the Mining Law of 1872, solely to preserve wilderness characteristics. Sec. 603 (c) states:

Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 204 of this Act for reasons other than preservation of their wilderness character.

Although this sentence deprives the Secretary of authority to withdraw wilderness review lands from appropriation under the mining laws in order to protect their wilderness characteristics, sec. 603(c) clearly directs the Secretary to regulate *how* activities undertaken

pursuant to the mining laws are carried out.⁸⁰

In order to consider in more detail the impact of sec. 603 on mineral assessment work, we must examine more closely the phrase "appropriation under the mining laws" as it is used in sec. 603 (c). Prior administrative decisions of this Department suggest that appropriation includes more than location of a mining claim by staking and monumenting. The filing of a location notice under other public land law statutes without actual settlement or occupancy initiates no rights in the location, *Donald R. Glittenberg*, 15 IBLA 165 (1974); *Peter Pan Seafoods, Inc. v. Shimmel*, 72 I.D. 242 (1965). Conversely, use and occupancy without a filing of a notice of location gives the locator no right to purchase. *Kennecott Copper Corp.*, 8 IBLA 21 (1972). If land is open, settlement and improvement establish rights which the Department will recognize if proper notice is timely filed. *Vernard E. Jones*, 76 I.D. 133 (1969).

The term "appropriation" as it has been used under these other public land law statutes envisions not only the *creation* of a right but the *maintenance* of the right as well.

⁸⁰ Unlike the specific prohibition in sec. 603 precluding the Secretary from withdrawing wilderness review lands from appropriation under the mining laws, no provision in sec. 603 prevents the Secretary from prohibiting new grazing uses if such a use would impair an area's wilderness characteristics. Sec. 603 therefore directs the Secretary to regulate and, if necessary, prohibit new grazing uses if required in order to preserve the wilderness characteristics of the land. Issuing grazing permits and mineral leases is discretionary with the Secretary; thus, they are easier to regulate under 603(c) than mining claims.

⁷⁸ 43 U.S.C.A. § 1732(b) (West Supp. 1970). (Italics added.)

See, generally, *Margaret Klatt*, 23 IBLA 59 at 70-76 (dissent) (1975). To create a right to a mining claim, the claimant must comply with Rev. Stat. sec. 2324, 30 U.S.C. § 28 (1970), with regard to location. To maintain that right, the claimant must also, among other things, perform annual assessment work.⁸¹ Failure to perform such work causes the ground to be in effect, "unappropriated" public domain and subject to relocation by another, Rev. Stat. sec. 2324, 30 U.S.C. § 28 (1970), as well as subject to an action to cancel by the United States, 43 CFR § 3851.3 (a).

As we have seen above (p. 113), the Secretary's wilderness protection responsibilities extend to the regulation of assessment work. Where assessment work on mining claims located in wilderness study areas is causing impacts which do not exceed the manner and degree in which those impacts were occurring on Oct. 21, 1976, then the Secretary may regulate under sec. 603 (c) only to insure that assessment work will not cause unnecessary and undue degradation of the involved lands and their resources or to protect the environment. Impacts exceeding the manner and degree of impacts on Oct. 21, 1976,

will be regulated in accord with a stricter standard, i.e., to guarantee that the area's suitability for inclusion within the wilderness system will not be impaired.⁸²

Interim wilderness study area regulations are currently in preparation in the Department. They probably will require that a mining claimant submit a plan of operations to BLM in advance of engaging in new work. The authorized officer will scrutinize the claimant's proposed activities on the mining claim (including assessment work) to determine their compatibility with the Secretary's duty to protect the area from impairment of its wilderness suitability, from unnecessary and undue degradation. If the proposed activities are incompatible, the authorized BLM officer will disapprove the plan of operations and require the claimant to provide a plan outlining alternative methods to conduct operations. I expect that most, if not all, of the conflicts between the need to perform assessment work and management under FLPMA sec. 603 can be resolved at this stage. For example, the authorized officer could require use of existing roads or ways or other forms of access, and could re-

⁸¹ Rev. Stat. § 2324, 30 U.S.C. § 28 (1970). A mining claimant must also record a notice of location and file an affidavit of assessment work or notice of intent to hold under § 314 of FLPMA; otherwise the claim is deemed abandoned. See 43 U.S.C.A. § 1744(a)(1) (West Supp. 1978).

⁸² I believe this standard is at least theoretically more strict because it is possible to conceive of a situation where, in order to perform assessment work and maintain his or her claim, a mining claimant could cause "necessary and due" degradation which would constitute an impairment of wilderness characteristics.

quire mitigating measures along with revegetation and other restoration requirements.

8. *Assignment.* The identity of the person carrying out the use is not important. Congress focused on the impact rather than the use. An individual, therefore, who was mining a claim on Oct. 21, 1976 can, assuming the assignment is otherwise valid, assign his claim to another person and the assignee may continue to mine under sec. 603, if his operations are conducted in the same "manner and degree" as those of the assignor on Oct. 21, 1976. The same result would obtain with a mineral lease or grazing permit assignment.

9. *Other Authority.* The Secretary under sec. 603 is not prevented from acting pursuant to other parts of FLPMA and other statutory authority in order to regulate existing mining and grazing activities so that a land use management objective other than the preservation of an area's wilderness characteristics can be met. For example, under the Taylor Grazing Act, 43 U.S.C. § 315 (b) (1970), the Secretary may revoke a grazing permit if he determines that a particular range can no longer support a certain number of animals due to drought. Sec. 603 should not be read to prohibit such a revocation in a wilderness study area if justified for reasons other than wilderness protection. Sec. 603 does not, in other words, freeze uses at their existing levels if, for reasons unrelated to wilderness protection, the Secretary determines they must be curtailed in order to carry out his other statutory responsibilities.

And one of these statutory responsibilities is, as noted above, the direction in sec. 603(c) (which is also repeated in sec. 302(b)) to "prevent unnecessary or undue degradation of the lands."⁸³

C. Section 603(c)'s Effect on Access to Private Lands

In general, access across public lands can only be granted under Title V of FLPMA, and the granting of any right-of-way is discretionary with the Secretary. Sec. 603 limits the discretionary authority of the Secretary by allowing him to grant access only if it will not impair the suitability of the area under review for wilderness designation.⁸⁴

Currently, the Solicitor's Office is preparing a memorandum involving the Secretary's authority to regulate access to and from mining claims. Regarding existing access across wilderness study lands to private property, any legal opinion is best given after reviewing each separate factual situation in light of the criteria in sec. 603.

D. General Effect of Section 603(c)

It should be emphasized that sec. 603(c) does not limit mining and grazing activities to the precise level at which they were occurring on Oct. 21, 1976. It allows for expansion or curtailment of these activities so long as the wilderness characteristics of the land under review are not impaired.

⁸³ As noted above, § 603(c) goes on to refer to "resources" as well as lands, and expands the Secretary's authority to "afford environmental protection."

⁸⁴ See also § 302(b), 43 U.S.C.A. § 1732(b) (West Supp. 1978), discussed at pp. 117 *supra*.

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It should also be reemphasized that sec. 603's restrictions are interim only, until a roadless area has been determined not to have wilderness characteristics, or until Congress has provided otherwise.

In summary, Congress intended mining and grazing activities to continue on BLM-administered lands under review for wilderness suitability, but subject (except for existing mining and grazing activities conducted in the same manner and degree as were occurring on the date of passage of FLPMA) to regulation so that they would not impair an area's wilderness characteristics.

This opinion was prepared with the assistance of Frederick N. Ferguson, Deputy Solicitor, John D. Leshy, Associate Solicitor for Energy and Resources, David Grayson, Assistant Solicitor for Land Use, Larry McBride, and Carolyn Osolinik of the Division of Energy and Resources. Gail Achterman and Robert Crotty, formerly attorneys in the Division of Energy and Resources, also worked on this opinion during their period of employment with the Department.

LEO KRULITZ,
Solicitor.

APPENDIX A

INITIAL WILDERNESS STUDY AREAS BUREAU OF LAND MANAGEMENT

Group No. A: Established Primitive Areas

Area/State:	Federal Register Citation
Aravaipa Canyon, Arizona-----	(36 FR 643; 8461)
Paria Canyon, Arizona-----	(34 FR 642)
Paiute, Arizona-----	(40 FR 44168)
Chemise Mountain, California-----	(40 FR 44341)
Powderhorn, Colorado-----	(38 FR 23427)
Centennial, Montana-----	(40 FR 32848)
Humbug Spires, Montana-----	(37 FR 18573)
Beartrap Canyon, Montana-----	(37 FR 18573)
Dark Canyon, Utah-----	(35 FR 18337)
Grand Gulch, Utah-----	(35 FR 14859)
Scab Creek, Wyoming-----	(40 FR 26721)

Group No. B: Established Natural Areas

Devil's Garden, Utah-----	(35 FR 19530)
Escalante Canyon, Utah-----	(35 FR 19529)
North Escalante Canyon, Utah-----	(35 FR 19529)
Phipps-Death Hollow, Utah-----	(35 FR 19530)

APPENDIX A—Continued

Group No. B: Established Natural Areas—Continued

Area/State—Continued

Federal Register Citation

The Gulch, Utah-----	(35 FR 19529)
Vermillion Cliffs, Arizona-----	(34 FR 642)
Big Sage, Arizona-----	(37 FR 20731)
Birds of Prey, Idaho-----	(36 FR 20228)
El Malpais, New Mexico-----	(39 FR 17451)
Rare Lizard and Snake, Colorado-----	(30 FR 1194)
High Mesa Grassland, Colorado-----	(30 FR 1194)
Sand Dune, Colorado-----	(30 FR 1194)
Book Cliffs, Utah-----	(33 FR 15914)
Mountain Meadow, Nevada-----	(30 FR 1194)
Bristlecone, Nevada-----	(30 FR 1194)
Pygmy Sage, Nevada-----	(30 FR 1194)
Pinyon-Joshua Pine, Nevada-----	(30 FR 1194)
Goshute Canyon, Nevada-----	(35 FR 19367)
Swamp Cedar, Nevada-----	(35 FR 19367)
Shoshone Ponds, Nevada-----	(35 FR 19367)
Turbinella and Gambel, Arizona-----	(30 FR 7899)
Pine Creek Canyon, Nevada-----	(30 FR 1194)
Sunrise Mountain, Nevada-----	(35 FR 14850)
Virgin Mountain, Nevada-----	(35 FR 9864)
Joshua Tree, Utah-----	(35 FR 9864)
Baker Cypress & Lava Rock, California-----	(30 FR 1194)
Bitterbrush, California-----	(30 FR 18224)
Lahontan-Cuthroat Trout, Nevada-----	(39 FR 6747)
Negit Island, California-----	(37 FR 18224)
Piute Cypress, California-----	(30 FR 1194; 7900)
San Benito, California-----	(36 FR 16122)
China Cup Butte, Idaho-----	(30 FR 1194)
Grassland Kipuka, Idaho-----	(30 FR 1194)
Halibut Cove Natural-----	(28 FR 1048)
Forest Study Area, Alaska-----	
Square Butte, Montana-----	(37 FR 18573)
Mathers, New Mexico-----	(35 FR 13670)
Guadalupe Canyon, New Mexico-----	(36 FR 17451)
Link Flats, Utah-----	(33 FR 15915)
Brewer Spruce, Oregon-----	(30 FR 1194)
Douglas Fir, Oregon-----	(30 FR 1194)
Little Sink, Oregon-----	(38 FR 21167)
Western Juniper, Oregon-----	(28 FR 2279)
Lost Forest, Oregon-----	(38 FR 10825)
Needle Rock, Colorado-----	(37 FR 17499)

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APPEAL OF J. A. LAPORTE, INC.**IECA-1146-3-77**Decided *February 14, 1979***Contract No. CX 500031057, National Park Service**

On Reconsideration, the equitable adjustment is recomputed.

1. Rules of Practice: Appeals: Reconsideration—Rules of Practice: Appeals: Timely Filing

When an appellant files a timely motion for reconsideration asking that an equitable adjustment be increased, the effect is to prevent finality from attaching to the original decision and the Board has jurisdiction to consider a Government response asking that the equitable allowance be reduced, even though the response was not filed within the 30-day period allowed for initial filing of a motion for reconsideration.

2. Contracts: Disputes and Remedies: Equitable Adjustments—Rules of Practice: Appeals: Reconsideration

When arguments advanced in a motion for reconsideration convince the Board that the formula used in determining an equitable adjustment was not the most accurate method but where neither party submits a better method, the Board will vacate its original finding regarding the equitable adjustment and make a recomputation based on the evidence of record.

APPEARANCES: Mr. Dillard C. Laughlin, Attorney at Law, Phillips, Kendrick, Gearhart & Aylor, Arlington, Va., for the appellant; Mr. Donald M. Spillman, Department Counsel, Atlanta, Ga., for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD**INTERIOR BOARD OF CONTRACT APPEALS**

Appellant's timely motion asked the Board to reconsider its decision of July 6, 1978 (78-2 BCA par. 13,306). That decision allowed an equitable adjustment of \$230,000 for a change in the captioned contract and appellant alleges that the amount of the equitable adjustment should be increased to \$496,080.

[1] The Government responded to the merits of appellant's motion and then, in the nature of a cross-motion, alleged that the equitable adjustment should be reduced. The Government's response was not filed within the 30-day period allowed by the Board's rules for the filing of a motion for reconsideration. Since the effect of the filing of appellant's timely motion was to prevent finality from attaching to the Board's original decision, the Board has jurisdiction to reconsider all matters in the original decision, including the portion of the decision that was favorable to the party who filed the timely motion for reconsideration. *Walsky Construction Co.* ASBCA Nos. 19875, 20501 (June 17, 1977), 77-2 BCA par. 12,632; *E. W. Bliss Co.*, ASBCA Nos. 9489 *et al.* (June 28, 1968), 68-2 BCA par. 7119.

The Board has given careful consideration to the arguments advanced by each party and to the evidence on which the parties rely. For reasons which will be discussed

in detail later in this decision, the Board now concludes that a better method of computing the equitable adjustment can be derived from the evidence of record. Accordingly, the Board's original decision that appellant is entitled to an equitable adjustment of \$230,000 is hereby vacated.

Appellant's Arguments

In moving for reconsideration, appellant advances a number of arguments under five general headings. Under the first heading, appellant argues that the equitable adjustment allowed by the Board is inadequate because the as-done pumping costs exceeded the bid estimate by \$786,665.42.¹ However, the mere fact that appellant's costs increased by a substantial amount is not proof that the Government was responsible for the increase. Absent a showing that the Government caused the increase, or some portion of it, the increase in costs may have indicated only that the bid estimate was too low. Appellant's argument does emphasize the desirability of finding a method of computing the equitable adjustment which does not use the bid estimate as a starting point.

Appellant's arguments under headings two, three, and four attempt to establish the extent of the Government's responsibility for the

increased costs. An examination of the evidence on which appellant bases the arguments discloses that all three arguments are flawed by a fundamental misinterpretation of the evidence and by certain assumptions which have no basis in the record.

Appellant assumes that the testimony of its consulting engineer establishes that its total pumping costs were increased first by 13.3 percent for increased pumping time and then by an additional 15 percent for increased maintenance or down time, all because of the change by the Government. The evidence does not support such assumptions.

With respect to the increase in pumping time, appellant's consulting engineer introduced exhibit A-4 on which he plotted the theoretical amount of time that would have been spent pumping, at each 100-foot location along the 10,200-foot length of the beach, to achieve an even distribution of the contract quantity of 1,250,000 cubic yards of sand. This theoretical computation resulted in an estimate that even distribution could have been achieved in 2424.64 hours of pumping time. Appellant's consulting engineer then plotted a curve based on appellant's actual pumping records which indicated that a total of 2748.40 hours of pumping time were required to complete the contract. This second curve showed where the Government's directions led to deviations from the even distribution contemplated by the contract. No sand was pumped on the beach south of location 223400 in

¹ The figure used by appellant for the increase in pumping costs is derived by reducing the total contract costs by the amount of the bid estimate for mobilization costs. As discussed later, the bid estimate for mobilization does not represent an accurate estimate of actual costs. See footnote 3.

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the area nearest to the borrow pit. This deficiency was made up by pumping additional quantities to various locations farther north on the beach and farther from the borrow pit. According to appellant's exhibit A-4, the only measurable effect of the change on appellant's operations was that the actual pumping time of 2748.40 hours was 323.76 hours more than the estimate of 2424.64 hours for even distribution.

Using the estimate of increased pumping time as a starting point, appellant's consulting engineer converted it to a percentage increase of 13.3. The calculation is mathematically correct but irrelevant to the process of determining an equitable adjustment for the change. Appellant's engineer testified that roughly 500,000 cubic yards of sand were involved in the change, leaving the remainder of 750,000 cubic yards placed as required by the contract. Since an equitable adjustment for a change can take into consideration only the costs of the changed portion of the contract,² the Board specifically rejected appellant's attempt to relate the change to the total pumping time which included both changed and unchanged work.

After discussing the basis for the computation of the increased pumping time, appellant's engineer was asked (II Tr. 136): "Q. Now, in addition to that 13.3 percent increase, would you project any addi-

tional increase and, if so, what was the basis for that?" Appellant's engineer gave an extended answer (II Tr. 136, line 24, to p. 140, line 24) in which he stated that the additional pumping time made it necessary to add time for repairs and additional greasing. He did not quantify his estimate of the additional time for these two operations. Instead, he discussed at length the problem appellant had with critical velocity in the 24-inch pipeline which made it necessary to open up the fuel racks to inject more fuel into the cylinders so the engines would develop more horsepower for the pumps. The engineer stated that appellant had anticipated a problem with critical velocity only on the maximum line and had expected that the operation would improve when pumping over shorter lines, but the problem remained for the entire job.

Apparently recognizing that most of this answer related to job problems that could not be attributed to the Government, appellant's counsel interrupted the answer to ask if the engineer had an opinion as to the additional increase in time required because of the change by the Government. The witness did not respond directly to the question but answered as follows (II Tr. 141): "A. I realize it is very difficult to assign a value on this, but I estimate he spent 15 percent longer on the job because he was pushing all of this machinery as hard as he was pushing it."

² *Dale Ingram, Inc. v. United States*, 201 Ct. Cl. 56, 71 (1973).

It is significant that the engineer attributed the additional time to pushing the machinery hard and that he did not attribute the necessity for pushing the machinery to the Government. It must be remembered that, as a result of the change, appellant pumped sand only to those locations where he was required to pump sand by the original terms of the contract. If appellant had a problem with the critical velocity of the sand in the 24-inch line for the entire northern two-thirds of the designated beach area, as his engineer testified, then the problem was inherent in the pumping machinery and would have existed even without the change.

A reexamination of the evidence on which appellant relies discloses that the only factors relevant to a determination of an equitable adjustment which may be gleaned from the testimony of appellant's engineer are that the actual pumping time was 323.76 hours more than his original estimate and that those additional hours of pumping time were performed at a higher cost than originally estimated.

At p. 7 of the motion for reconsideration, appellant suggests that the computation of his increased costs should be as follows:

Total actual as-done costs	\$1, 874, 165. 42
Less: Mobilization-----	150, 000. 00
As-done pumping costs--	1, 724, 165. 42
Divided by 1.15 for increased down time	
Actual as-done costs increased for additional pumping -----	1, 499, 274. 20

Divided by 1.133 for increased as-bid pumping

Actual as-bid costs-----	1, 323, 278. 20
Adjustment for increased pumping -----	175, 996. 00
Adjustment for increased down time-----	224, 891. 22
Total increased costs -----	400, 887. 22
Rounded by using 30% to \$397,884.33 -----	(. 30295)

The computation is erroneous in each of its steps, beginning with the cost of mobilization. Appellant's president testified that his bookkeeping yielded only total job costs and did not separate mobilization costs and pumping costs.³

Since mobilization costs were involved along with the total cost, it cannot be assumed that the bid estimate of \$150,000 for mobilization was the actual cost. The two cost items for pumping and mobilization are indistinguishable due to appellant's recordkeeping and in these circumstances we can only assume that both costs rose proportionally.

* "Q. There was a separate item in the bid for mobilization, was there not.

"A. Yes, there was.

"Q. What was the amount of that?

"A. My bid was \$150,000.00 for mobilization and demobilization.

"Q. Is there any way that you could break out of those costs you have tendered to the Court here the mobilization and demobilization costs?

"A. It would be quite difficult. It was * * * a lot of it was involved along with the total cost. We did not, what I mean is that we did not make a separate [sic] item in our normal bookkeeping of mobilization costs and pumping costs. We just had total job cost.

"Q. Do you expect some profit in your mobilization bid?

"A. Normally, not very much." (II Tr. 47).

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An estimate of the actual mobilization costs may be deduced from the evidence of record. Appellant's bid estimate of pumping costs for 1,250,000 cubic yards, based on testimony of appellant's president (II Tr. 26) was \$937,500. Adding the bid estimate of \$150,000 for mobilization, the total estimated costs were \$1,087,500. The total as-done cost for the contract of \$1,874,165.42 represents a 72-percent increase over the bid estimate. Seventy-two percent of \$150,000 is \$108,000, bringing the total estimate of mobilization costs to \$258,000.

The estimated as-done pumping costs then becomes \$1,616,165.42 (\$1,874,165.42 minus \$258,000.00) instead of \$1,724,165.42 as computed by appellant.

The next step in appellant's computation, dividing the as-done pumping costs by 1.15 for increased down time, is erroneous for two reasons. As discussed above, the testimony of appellant's engineer was that it took 15 percent longer to perform the job because the machinery was being pushed so hard. Pushing the machinery was required to overcome a critical velocity problem in the line and was not caused by the Government. Secondly, even if the increase in time could be attributed to the Government, the evidence of record does not support a conclusion that a 15-percent increase in total performance time translates directly into a 15-percent increase in costs.

It is apparent that fuel costs declined or ceased during periods

when the pumping operation was shut down so it cannot be assumed that an increase in total time spent on the contract because of shutdown resulted in a commensurate increase in costs. Further, the correct correlation between increased performance time because of shutdowns and increased costs cannot be determined in view of the testimony of appellant's president that his bookkeeping yielded only total costs.

The final step in appellant's computation uses the percentage relationship between the estimated increase in pumping time and the total actual pumping time despite the testimony of appellant's engineer that only about 40 percent of the work was changed.

The entire calculation suggested by appellant is so filled with erroneous interpretations of the evidence and unwarranted assumptions that it offers no reasonable basis for computation of the equitable adjustment to which appellant is entitled as a result of the Government's change.

In the original decision on the amount of the equitable adjustment, the Board used the estimates of appellant's engineer that roughly 40 percent of the work was changed and that the contract could have been performed in 2424.64 hours of pumping time to compute that the changed work could have been pumped in 969.86 hours (40 percent of 2424.64). In argument number four, appellant alleges that the work which was changed could have

been performed in 743.73 hours of pumping time without the change, citing the pumping calculations which were used in plotting the even distribution curve in exhibit A-4. While these figures show that 500,000 cubic yards at the south end of the beach could have been pumped in an estimated 743.73 hours, not all of those 500,000 cubic yards were displaced as a result of the change. Appellant's exhibit A-4 shows that more than 100,000 cubic yards from locations 223400 to 222500 were placed where the contract required. The exhibit also shows that additional displacements further north amount to less than 50,000 cubic yards.⁴

This examination of exhibit A-4 in conjunction with the pumping calculations cited in appellant's motion leads inescapably to the conclusion that the estimate by appellant's engineer that roughly 40 percent of the work was involved in the change was a very rough estimate indeed. His own chart shows that less than 450,000 cubic yards were changed rather than 500,000 (40 percent of 1,250,000).

[2] Accordingly, the Board is now of the opinion that its reliance on the estimate of appellant's engineer, regarding the number of cubic yards involved in the change, was unwarranted.

⁴ The scale used in appellant's exhibit A-4 and the nature of the curves do not permit a precise determination of the cubic yardage pumped at each location. An estimate can be made from the fact that 13,586.97 cubic yards would have been pumped at each location except for transition areas in order to achieve even distribution as called for in the contract.

The Board also followed appellant's method of calculating that the percentage of increase in performance time due to increased maintenance and down time resulted in the same percentage of increase in costs. As indicated above in the discussion of appellant's calculation of its estimated increase in costs, this approach failed to take into account the absence of any fixed relationship between additional time required for performance and additional costs attributable to the changes.

Finally, the Board applied the percentages of increased pumping time and increased maintenance to appellant's bid estimate of pumping costs for the changed work as a starting point for the calculation of the equitable adjustment. We are now persuaded by appellant's argument No. 1 that the bid estimate was unreasonably low and should not be used in such calculation.

It is upon the basis of the foregoing analysis that the Board has vacated its finding with respect to the amount of the equitable adjustment.

The Government's cross-motion for reconsideration to reduce the amount of the equitable adjustment submits a calculation (in item 10 of the motion) based on the contract price. This calculation does not take into consideration the increased costs resulting from the change and cannot constitute a proper basis for determination of the equitable adjustment. On oral argument, the Government further suggested that only 303,612 cubic yards of sand

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were displaced in the change and that use of that figure in the Board's formula would reduce the amount of the equitable adjustment. Government Exhibit GX-2, from which the figure was derived, is based on the measurement of sand removed from the borrow pit and is not sufficiently correlated with the discharge points on the beach to enable a determination of the amount of sand involved in the change.

For the reasons stated above, the Board has determined that the formula it used in the original computation of the equitable adjustment was not as accurate a measure as is available for determining the amount of excess costs properly attributable to the change. Neither appellant nor the Government has offered an acceptable method of determining such costs. The evidence of record provides a basis for such determination, however.

As discussed above, a reasonable estimate of appellant's total pumping costs is \$1,616,165.42. It follows that the total pumping time required for completion of the contract, 2748.40 hours, was performed at a cost of \$588.04 per hour. This computation includes all of the additional costs of maintenance necessary to perform the hours of pumping, without resorting to the use of percentage estimates.

In our earlier decision, we found that the estimate of 323.76 increased pumping hours as a result of the change was accurate since it was

based on appellant's experience with the same equipment in performing a prior contract utilizing the same borrow pit. Our reconsideration discloses no reasons for overturning that finding. We therefore find that the increase in pumping hours caused by the change was performed at a cost of \$190,383.83 ($\588.04×323.76).

On the basis of the testimony of appellant's consulting engineer, the increased costs involved in performing the original estimate of 2424.64 pumping hours cannot be attributed to the Government since they were the result of pushing the machinery hard to overcome a critical velocity problem in the 24-inch line which persisted throughout the performance of the contract. Such increase would have occurred whether or not the contract was changed. When the Government-directed change caused additional hours of pumping in a high cost area, the Government is obliged to pay for those costs at the rate actually being experienced by appellant at the time of the change.⁵ Payment at the unit prices specified in the contract would not be adequate compensation in view of the ma-

⁵ The proper method of computing an equitable adjustment is the reasonable cost of the extra work and materials plus profit. *Bregman Construction Corp.*, ASBCA No. 15020 (Apr. 13, 1972), 72-1 BCA par. 94111 at p. 43,718. Actual costs incurred by the contractor are presumed to be reasonable and establish a prima facie case for recovery. *Ocean Technology, Inc.*, ASBCA No. 21363 (Apr. 28, 1978), 78-1 BCA par. 13204. Although the presumption is rebuttable, the Government did not audit appellant's costs and has not otherwise overcome the presumption.

terially increased costs attributable to the change. Accordingly, the Board finds that appellant is entitled to the full cost of performing the additional hours of pumping caused by the change in the sum of \$190,383.83.

Appellant argues on p. 9 of its motion that the limitation of 15 percent of actual necessary costs for profit contained in General Provision No. 32 of the contract should not apply since the preferred method of pricing a change under that provision is a stated lump sum price negotiated in advance between the contractor and the contracting officer. The lump sum, in appellant's view, would not have limited profit to 15 percent. Contrary to appellant's assertion, General Provision No. 32 gives the contracting officer the election, for any reason, to use either the lump sum method or actual necessary costs plus a fixed fee not exceeding 15 percent for profit. Further, appellant did not recognize until most of the contract had been performed that the Government's directions as to the placement of the sand had caused a change.⁶ Consequently, the contracting officer did not have the opportunity to negotiate a lump sum in advance and had no choice but to elect to follow the second method for determining costs and profit.

In its original decision on the amount of the equitable adjustment,

⁶ Appellant first notified the contracting officer of his claim for a change by letter of Aug. 15, 1973 (Appeal File Exh. 19). Performance of the contract was substantially complete on Sept. 19, 1973 (Appeal File Exh. 14).

the Board found the 15-percent limitation to be binding and no valid reason has been advanced for a different result. We therefore compute the profit as 15 percent of \$190,383.83 or \$28,557.57. The total equitable adjustment to which appellant is entitled is therefore the sum \$218,941.40.

With respect to interest, appellant asserts in its argument No. 5 that the Board should determine the interest instead of returning the matter to the contracting officer. The payment of interest clause which the Board found applicable provides that interest shall run from the date of the written appeal to the date of mailing to the contractor of a contract modification carrying out the decision of the Board.⁷ As the Board cannot determine in advance when the contracting officer will implement this decision by mailing such modification, the duration of the period for which interest runs must necessarily be determined by the action of the contracting officer.

Conclusion

On reconsideration, the Board finds that appellant is entitled to an equitable adjustment in the amount of \$218,941.40 and remands the matter to the contracting officer for determination of the amount of interest to be paid from Dec. 27, 1973, to the date of mailing a con-

⁷ See fn. 6 to the Board's decision of July 6, 1973. The parties stipulated that interest should run from Dec. 27, 1973 (H Tr. 17).

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tract modification implementing this decision, pursuant to the applicable payment of interest clause.

G. HERBERT PACKWOOD,
Administrative Judge.

WE CONCUR:*

WILLIAM F. MCGRAW,
Chief Administrative Judge.

RUSSELL C. LYNCH,
Administrative Judge.

BUREAU OF LAND
MANAGEMENT
V.
HOLLAND LIVESTOCK
RANCH ET AL.

39 IBLA 272

Decided February 15, 1979

Appeals from decisions by Chief Administrative Law Judge L. K. Luoma (California 2-77-1(SC)) and Administrative Law Judge Harvey C. Sweitzer (California 2-75-2(SC)) finding appellants liable for willful and repeated grazing trespasses and reducing appellants' grazing privileges.

California 2-77-1(SC) is affirmed as modified; California 2-75-2(SC) is affirmed as modified.

1. Administrative Procedure: Burden of Proof—Administrative Procedure:

* Administrative Judge George S. Steele, Jr., who participated in the Board's decision of July 6, 1978, is no longer a member of the Board.

Decisions—Administrative Procedure: Hearings—Administrative Procedure: Substantial Evidence—Evidence: Burden of Proof—Evidence: Sufficiency

After holding a hearing pursuant to the Administrative Procedure Act, an administrative law judge may properly find that a person has committed a grazing trespass if that finding is in accordance with and supported by reliable, probative, and substantial evidence.

2. Evidence: Generally—Grazing Permits and Licenses: Trespass—Rules of Practice: Evidence—Trespass: Measure of Damages

Where the evidence as to specific trespass indicates that of a number of cattle counted some were located on private intermingled land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands.

3. Estoppel—Federal Employees and Officers: Authority to Bind Government—Grazing Permits and Licenses: Generally

Estoppel to preclude a charge of trespass is not invoked against BLM where BLM's partially completed fences on Federal land do not restrain cattle and there is no evidence that BLM agreed to construct and/or maintain said fences for the benefit of the grazer, and such grazer was at all times aware of these facts.

4. Estoppel—Federal Employees and Officers: Authority to Bind Government—Grazing Permits and Licenses: Generally

The grazing regulations (43 CFR 4140.1 (b) (1), *inter alia*) (formerly 43 CFR 4112.3-1(a) and (b)): place the responsibility of controlling cattle squarely on the grazer, and Government range management policies as implemented under acts of Congress cannot be asserted to bar sanctions where trespasses have been proved, or to estop BLM from alleging trespasses.

5. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Cancellation or Reduction—Grazing Permits and Licenses: Trespass

An administrative law judge's finding that trespasses were willful, grossly negligent, and repeated will not be disturbed on appeal where the record amply supports such finding.

6. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Cancellation or Reduction—Grazing Permits and Licenses: Trespass

Where penalties imposed by two administrative law judges for trespasses are supported by the records and comport with the proscriptions of the regulations they will not be modified on appeal except insofar as they conflict with respect to a particular grazer in a particular grazing district.

APPEARANCES: Jack D. Dwosh, Esq., and Robert R. Lee, Esq., Covey and Covey, P.C., Los Angeles, Calif., for appellants; Bryce Rhodes, Esq., Hawkins, Rhodes, Sharp & Barbagelata, Reno, Nevada, for intervenor John Hancock Mutual Life Insurance Co.; Burton J. Stanley, Esq., and James E. Turner, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Sacramento, Calif., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

These are consolidated appeals from separate decisions by Chief Administrative Law Judge L. K. Luoma (California 2-77-1, June 13, 1978), and Administrative Law Judge Harvey C. Sweitzer (California 2-75-2, Aug. 4, 1978), finding appellants liable for monetary damages for willful and repeated grazing trespasses, and reducing appellants' grazing privileges.

The decision in 2-75-2 involves the Susanville and Winnemucca grazing districts. The Susanville District is mostly in California but extends into Nevada, abutting on the Winnemucca District in Nevada. A fence with several gates partially divides these two areas. The trespasses in 2-75-2 were alleged to occur in both grazing districts within the Cal-Neva Unit in the Susanville District, and the Buffalo Hills Resource Area of the Winnemucca District. Appellants¹ own, lease or control areas of private land in both districts which are intermingled with public lands. John J. Casey, appellants' controlling owner, held a license to graze cattle in the Cal-Neva Unit (Susanville) through Feb. 28, 1975. At

¹ Holland Livestock Ranch is a co-partnership composed of three corporations: Bright-Holland Co., Maremont-Holland Co., and Nemeroff-Holland Co. John J. Casey owns controlling interest in all three.

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times pertinent to the decision in 2-77-1, Mr. Casey held no license in the Cal-Neva Unit. At all times relevant to the proceeding in 2-75-2, Casey held a license to graze cattle in the Buffalo Hills Resource Area (Winnemucca).

The proceeding in 2-75-2 involves 15 alleged trespasses in the Susanville District and 10 alleged trespasses in the Winnemucca District. The trespasses, as to number of cattle involved, periods of time, AUMs consumed, and location are summarized in a table on pp. 2-5 of Judge Sweitzer's decision.

The proceeding in 2-77-1 concerns three trespasses, all alleged to have occurred in the Susanville District.

In both proceedings, the commercial rate for forage used (both grazing districts) was \$3.50 per AUM.

The issues, as stated by appellants in their opening briefs and acknowledged by the Bureau of Land Management (BLM), are essentially as follows:

A. Whether the evidence was sufficient to show the physical location of the cattle allegedly in trespass;

B. Whether cattle may be considered to be in trespass while located on private, unfenced land because of unrestrained access to public lands;

C. Whether BLM should be estopped to allege trespass because it failed to construct and maintain certain fences; and because of its

management policies on the Federal range;

D. Whether the element of willfulness was proved; and

E. An additional suggestion made by BLM in its brief is that one of the sanctions (reduction of grazing privileges) imposed by Judge Sweitzer in 2-75-2 was not sufficiently severe.

Each of these issues will be discussed in turn having reference to the findings and conclusions of the decisions appealed from and to the arguments made in the parties' briefs.

A.

Appellants contend that the methods employed by BLM to determine that cattle were trespassing were fraught with errors and irregularities; as a result it was not accurately shown that cattle were in fact trespassing in any specific instance. Appellants do not enumerate specific instances. They base this general argument on the testimony of Mr. Simpson, a licensed land surveyor who stated that the planning unit maps used by BLM to ascertain the locations of cattle were not accurate. However, Mr. Simpson also testified that no better maps were available and that if a survey were not available he would use the maps to determine trespass. Moreover, he could identify no specific inaccuracies in the maps.

As stated in Judge Luoma's decision, BLM employees also observed trespassing cattle from an airplane and from horseback. They ascertained the location of the animals by sighting geographical features of the terrain; used U.S. Geological Survey (USGS) topographic maps and planning unit maps, checking land status against master title plats. In addition cattle were identified by brand. Judge Luoma found that BLM's methods "entailed more than a cursory inspection of the animals" and that the "aerial surveys supplemented by ground counts and brand inspections were sufficient to establish the fact and duration of the trespasses" (2-77-1, p. 6).

Judge Sweitzer made the following findings as to this issue at p. 16 of his decision in 2-75-2:

Although it may very well be that these agents of the BLM can and do make mistakes in estimating distances on the ground, I find from their testimony that they are experienced map readers and I accept their estimation as sufficient in determining the cattle's approximate locations. Respondents have failed to prove or even introduce evidence to show that the cattle were not, in fact, found where agents of the Bureau of Land Management testified that they were found.

Judge Sweitzer gave the following summary and evaluation of Mr. Simpson's testimony:

[He] testified that to determine whether a particular parcel of land was, in fact, private or public land, he would initially consult the deeds at the local courthouse of the county in which the land is located. Apparently this information would give Mr. Simpson a sufficient legal description of the area concerned. Then

he would utilize local maps of the area, including U.S. Geological Survey maps, county maps, road maps, and other maps of record, to commence actual search for original section corners established by the U.S. Government Land Office surveys of the late 1800s. Then, through surveys, he would lay out the actual boundaries of the land in question. He also testified that master title plats are useless in determining actual locations on the ground. Apparently, this is because the master title plats may give indications of ownership on the public domain in terms of sections; however, knowing the ownership of a particular section does not assist in determining where that section is located. He explained the physical location of any given section can only be affirmatively established by a survey working from well-established section corners. He stated that the location of sections on the planning unit maps could be as much as a mile off from their true locations. Despite this, Mr. Simpson did not testify as to whether any given section boundary on the Susanville and Winnemucca maps is, in fact, as much as a mile off from its true location. The most he would say about the accuracy of these maps for determining section boundaries were that they provided "a general indication of the areas distinction between private and public lands."

2-75-2, p. 16.

Judge Sweitzer's conclusion is as follows:

Although I do not question Mr. Simpson's testimony regarding the procedures that a professional surveyor would undertake to establish boundaries on private lands, I do question the necessity for such a procedure in order to determine the location of trespassing animals. I find that such a procedure as he described to be unwarranted and unnecessarily expensive and time-consuming for purposes of proper range management, and that the method described by agents of the Bureau of Land Management is sufficient to es-

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establish a prima facie case as to whether cattle are found on public or private lands. Although respondents have attempted to cast doubt upon the accuracy of such a method, no evidence was introduced which shows, in fact that the agents of the Bureau of Land Management had erred in their determinations. Therefore, absent contrary probative evidence, I accept the government testimony as to whether cattle were found on public or private lands. The results of this finding with respect to each trespass is shown in the Conclusions section of this decision.

2-75-2, p. 17.

[1] The decisions appealed from set forth in detail the evidence relied upon to substantiate the individual trespasses found by the administrative law judges to have occurred. The contentions presented to the Board by appellants were fully considered by the judges. On appeal, appellants suggest in addition that the quantum of evidence adduced to support the alleged trespasses may not have been "substantial" as required by the Administrative Procedure Act, 5 U.S.C. § 556(d) (1976) which reads in part: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." Substantial evidence has been described as the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *John W. McGrath Corp. v. Hughes*, (C.A. N.Y. (1959)), 264 F.2d 314 (2d Cir.

1959) cert. denied, 360 U.S. 931 (1959). In *Bureau of Land Management v. Ross Babcock*, 32 IBLA 174, 183-4, 84 I.D. 475, 479-80 (1977), the Board stated with respect to sufficiency of evidence:

In a hearing held pursuant to the Administrative Procedure Act, a decision must be in accordance with and supported by reliable, probative, and substantial evidence, but the decision need not be supported by so much evidence as would dispel all reasonable doubt. 5 U.S.C. § 556(d) (1970). Therefore, an Administrative Law Judge may properly find a grazing trespass has been committed where there is reliable, probative and substantial evidence of the trespass.

Both decisions below more than meet this test and appellants' challenges fall short of demonstrating error therein. Accordingly, we find no reason to disturb the findings and conclusions of either decision with respect to the issue of sufficiency of evidence to prove cattle in trespass.

B.

We turn now to the second issue which is whether cattle may be considered to be in trespass when they have unrestrained access to the public lands. Judge Luoma so ruled in 2-77-1. However, Judge Sweitzer in 2-75-2 distinguished *Babcock*, *supra*, where the Board held that in some cases cattle found and counted on unfenced private lands may be presumed to obtain portions of their forage from the public lands, as follows:

First, Babcock's lands were totally unfenced, thereby allowing more freedom

for cattle to drift across private land boundaries. In the present case, the evidence shows some fencing, albeit with gaps, which would tend to decrease the chances of drifting. Secondly, the facts in *Babcock* suggest that appellant there could utilize his lands only in conjunction with a federal license, whose terms he violated by turning the cattle out early without effective restraint. Here, respondents have no license in the areas of the alleged trespasses within the Susanville District, and it is not apparent that federal lands must be utilized in order for them to utilize their own lands. This factor was an important consideration in *Nick Chourmos*, A-29040 (Nov. 2, [6] 1962), a case cited by the Board to support its holding in *Babcock*. Moreover, although there is no indication in the decision of the size of the parcels of land in *Babcock*, the areas of land involved could have a bearing on the validity of the presumption that cattle considered as a whole, would obtain a percentage of their forage from the public lands. In the instant case, respondents control extensive holdings in the Cal-Neva Common Allotment and the effect of a strict application of the rule in *Babcock* could conceivably have a devastating impact on the use of respondents' private lands. For example, if but one cow of a herd of several hundred should stray through a break in a fence surrounding a large private ranch, the government might consider the fence as ineffective and trespass the entire herd. There is no evidence in the record as to the total number of Casey cattle grazing on private lands, hence the reasonableness of the use of the presumption is difficult to assess in this case.

Many factors other than fences (such as the quality and quantity of forage, salt licks, availability of water, and terrain features) may limit the movement of cattle from private to public lands. In this case, the government has generally failed to present any evidence other than the poor fence conditions to show trespasses of those cattle counted on private

lands. Presumptions against the respondents in a case of alleged trespass should be used with care and I am unwilling to apply so strict a presumption on the basis of the evidence presented here. Thus, as applied to this case, I find that only cattle observed on the federal range may be counted as in trespass absent reliable, probative and substantial evidence that cattle found on private land would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands. A review of the record on the whole does not provide such evidence.

2-75-2, pp. 10-11.

BLM has appealed Judge Sweitzer's holding, contending that the facts adduced in 2-75-2 fit squarely within the *Babcock* rule. BLM asserts that in virtually every case where cattle were counted on private lands, there were no fences or barriers, artificial or natural, which would in any way impede the cattle from entering the public land. BLM cites several transcript references where the question was asked whether there was any physical barrier which would in any way inhibit "the cow that you observed" from walking onto land owned by the United States. In each case, the answer was in the negative.² BLM concedes that appellants did have certain fences which were not in "excellent shape" but asserts that it did not trespass cattle found within such fenced areas. It states that the trespasses for which it sought damages were for cattle uniformly located on private intermingled lands where no barrier whatsoever, either

² The transcript references are: 2-75-2 pp. 1-571, 1-640, 1-704, 2-27, 2-60.

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natural or artificial, would have prevented the cows from entering the public lands.

Judge Sweitzer (2-75-2, p. 17) accepted the Government's testimony as to whether cattle were found on public or private lands, and this finding is reflected in the conclusory section of his decision with respect to each trespass litigated. On p. 23, the judge stated: "Cattle counted on private lands have been deducted from the numbers testified to by government employees."

[2] We believe that Judge Sweitzer's refusal to count cattle located on private lands, but with access to public lands, is in error, and we modify his decision with respect to each of five trespasses in which he deducted cattle found on private lands. We have correlated each of these trespasses to the transcript citations given by BLM and we base our modification of the decision on the unrefuted testimony that in each instance nothing would have prevented the animals from going onto the public land. The Board stated in *Midland Livestock Co.*, 10 IBLA 389, 402 (1973), "[A]s the boundaries between the federal range and private lands were of a legal rather than a physical nature it strains credibility to believe that the animals grazing would respect the same."

The five trespasses in question are Nos. 142, 173, 176, 177, and 178, all in the Susanville grazing district.

The judge's disposition of these trespasses is found on pp. 25-27 of his decision (2-75-2). We adopt here in the judge's method of calculating damages which is as follows (p. 23): The animal unit months of forage consumed is the product of the number of cattle found in trespass and the number of days of trespass. This product is divided by 30 (number of days per month). The number of cattle designated as in trespass during a term of days in which a count is not made is the lesser number of either the beginning count or the ending count when the trespass was terminated by a subsequent count. The amount of forage consumed is further adjusted by multiplying the total AUMs by the ratio which the forage on public lands bears to the total available forage in the two separate districts. The result is then multiplied by twice the stipulated commercial rate for forage, \$7 per AUM. A fractional AUM is rounded up to the next whole number.

Trespass No. 142 (Tr. 1-522, 571). The judge deducted 13 cattle from a total of 55 because 13 were found on private land. He found 42 cattle in trespass for 7 days. In the second portion of this trespass, he found 15 cattle in trespass for 6 days having deducted one animal which was counted on private land. The judge's result is a total of 11 AUMs amounting to \$77 in damages. Including the cattle counted

on private land, we reach a result of 16 AUMs amounting to \$112 in damages.

Trespass No. 173 (Tr. 1-640). The judge deducted 22 cattle from a total of 67 because 22 were found on private land. Thus he calculated that 45 head were in trespass for 4 days resulting in 6 AUMs and damages of \$42. Including the 22 head counted on private land, we reach a result of 9 AUMs and \$63 in damages.

Trespass No. 176 (Tr. 1-704). The judge deducted 4 cattle from a total of 46 because 4 were found on private land. The judge found 42 cattle in trespass for 14 days. Of these 42, 5 were removed by appellants and 37 remained in trespass for 31 days. He calculated 50 AUMs for damages of \$350. Including the cattle counted on private lands gives 64 AUMs for \$448 in damages.

Trespass No. 177 (Tr. 2-27). The judge deducted 4 cattle from a total of 10 because 4 were counted on private lands. He found that 6 head were in trespass for 2 days. He also deducted 4 cattle from 30 because 4 were counted on private lands, finding that 26 were in trespass for 14 days. He calculated 11 AUMs and damages of \$77. Adjusting for the cattle found on private lands we obtain 15 AUMs for \$105 in damages.

Trespass No. 178 (Tr. 2-60). The judge deducted 13 cattle from 120 finding that 107 were in trespass for 1 day. He also found that 91 were in trespass for 11 days. The judge calculated 32 AUMs and

damages at \$224. We calculate 38 AUMs for damages of \$266.

For violations in the Susanville grazing district, Judge Sweitzer assessed a total of \$1,239. We add \$224 (additional damages, as hereinabove calculated for cattle counted on private lands) for a total of \$1,463.

Judge Luoma in 2-77-1, p. 6, stated with respect to the access-trespass issue: "I find that the trespass notices for animals found on unfenced private land were valid because the animals were free to drift and graze onto the Federal range, *Bureau of Land Management v. Ross Babcock*, 32 IBLA 175 (1977)." Cf. *Midland Livestock Co., supra*.

C.

Appellants assert that BLM should be estopped from alleging the occurrence of trespasses because BLM failed to construct and/or maintain certain fences. One fence in question is the Susanville/Winemucca grazing district division line fence which was incomplete so that the two districts were not in fact separated. Appellants assert that because the fence was incomplete it had no maintenance responsibility, no division line existed, and any license to graze upon one district constituted a license to graze both districts. Appellants proffer the same arguments with respect to two other fences, which, because of their states of completion or repair, were ineffective to restrain cattle. Appellants also suggest that BLM's range manage-

ment practices had the effect of increasing the population of wild horses and burros which in turn caused a loss of forage and destruction of cattle control devices.

Judge Sweitzer's disposition of these arguments (pp. 12-13, 2-75-2) is as follows:

The short answer to these contentions is that estoppel is generally not applicable against the government. See *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). Despite the *Merrill* case, however, many circuit court cases have applied the doctrine of equitable estoppel against the government where "justice and right require it." See *Davis, Administrative Law of the Seventies*, §17.01 (1976). However, in those cases which have held the government estopped, certain elements have been proved to invoke the defense. The Supreme Court has held that:

"As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. * * *"*Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 409 (1917).

The court has since left open the question of whether *affirmative misconduct* (rather than neglect) on the part of the government might estop it. *Montana v. Kennedy*, 366 U.S. 308 (1961). There is no allegation in the argument of respondents that the acts here complained of are a result of affirmative misconduct and the estoppel claim must fail on that ground alone.

Additionally, the Ninth Circuit in *U.S. v. Wharton* has outlined the elements of estoppel [3] that must be proved to establish the defense.

"(1) The party to be estopped must know the facts; (2) he must intend

that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

514 F.2d 406, 412 (9th Cir. 1975).

Even if the facts alleged are true, respondents' conduct in allowing their cattle to graze on the federal range can in no way be said to be based on ignorance of the true facts, i.e. that the fences were not constructed or properly maintained or that wild horses and burros were tearing down fences. Respondents knew or should have known the conditions complained of at the time cattle were placed on the range and cannot be said to have justifiably relied on any promise of action on the part of the government. The government may be in some small part responsible for conditions which would tend to make prevention of trespasses by respondents more difficult, but the allegations of respondents do not approach the requirements for invoking estoppel as a defense.

Responding particularly to the judge's statement of the law on estoppel, appellants concede that they "knew the facts surrounding the failure to construct the division fences" but assert that BLM "adduced no evidence whatsoever suggesting that at the time the agreements were entered into that appellants had any knowledge whatsoever of the true course of conduct that would be followed by [BLM]" (Brief pp. 15-16). Appellants state that their reliance and injury are amply demonstrated.

In its brief BLM states that no trespasses were cited because of inadequate fences, that it is the re-

* Cf. *Union Oil Co. of Calif. v. Morton*, 512 F.2d 743, 748 (9th Cir. 1975).

sponsibility of the cattle operator to keep his cattle where they belong, and that the record contains no evidence of the "agreements" referred to by appellants. BLM further states that the United States is not obligated to fence the public lands for proper range management and that wild horses are on the public range because of an act of Congress, 16 U.S.C. §§ 1331-1340 (1976).

[3, 4] It is our view that all of appellants' contentions concerning estoppel lack merit and were properly disposed of by Judge Sweitzer.

A grazing trespass exists where livestock are grazed on Federal public land in excess of the authorized permit use or without an appropriate permit or license. *Eldon Brinkerhoff*, 24 IBLA 324, 83 I.D. 185 (1976); *Eldon L. Smith*, 8 IBLA 86 (1972). Government range management policies as carried out under the "Federal Range Code" (Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U.S.C. § 315 (1976), and regulations promulgated thereunder) cannot be asserted to bar the implementation of prescribed sanctions where trespasses have been proved.

43 CFR 4112.3-1,⁴ in force and effect at all times pertinent to this decision, provides that:

⁴ The new regulation, 43 CFR 4140.1(b) (1) (Cir. No. 2433), provides that:

"Allowing livestock on or driving livestock across these lands without a permit or lease or in violation of the terms and conditions of a permit or lease, either by exceeding the number of livestock authorized, or by allowing livestock to be on these lands in an area or at a time different from that designated," are prohibited acts.

(a) Grazing livestock upon, allowing livestock to drift and graze on, or driving livestock across the Federal range, including stock driveways, without an appropriate license or permit, regular or free-use, or a crossing permit.

(b) Grazing livestock upon or driving livestock across the Federal range, including stock driveway, in violation of the terms of a license or a permit, either by exceeding the number of livestock permitted, or by allowing livestock to be on the Federal range in an area or at a time different from that designated, or in any other manner.

are prohibited acts. The regulation places the responsibility of controlling cattle squarely on the cattle operator and the case law is to the same effect. *Cesar and Robert Siard*, 26 IBLA 29 (1976); *O. R. Britain*, A-25962 (Jan. 24, 1951).

Appellants point out that Judge Luoma did not comment on estoppel in 2-77-1. Our discussion of the nonapplicability of estoppel to the facts herein involved needs no further emendation.

D.

Appellants contend that both judges erred in finding the trespass to be willful. They assert that trespasses were beyond their control because there were broken fences and because gates were opened by others. Appellants state that they made efforts to round up cattle which had crossed division lines to rebuild damaged fences, and to add new fences. They further state that they acted to remove cattle when notice of trespass was actually received. Appellants also appear to argue that they, as grazing licensees, were

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somehow deprived of a property right without due process of law.

As appellants themselves point out, Judge Sweitzer, in 2-75-2, considered mitigating circumstances but was compelled to conclude that they were outweighed by evidence demonstrating willfulness. We quote Judge Sweitzer's thorough analysis of this issue (pp. 19-22):

The Interior Board of Land Appeals has formulated the following standard regarding "willfulness" in the context of grazing trespass:

"Although 'willfulness' is basically a subjective standard of the trespasser's intent, it may be proved by objective facts. Thus, in determining whether grazing trespasses are 'willful,' intent sufficient to establish willfulness may be shown by evidence which objectively shows that the circumstances did not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent." (citations omitted) *Eldon Brinkerhoff, supra* at 191.

Mr. Casey's state of mind reflecting on the willful nature of the actions involved is disclosed by several factors. First, despite his extensive land holdings and large number of cattle, he employed only two persons during the period of time involved to control the cattle in the Susanville and Winnemucca Districts. Mr. Brunson worked for Casey for approximately six months and Mr. Syriac's duties were unspecified and the length of time in which he worked for Mr. Casey is not disclosed on the record. Further, Mr. Casey's testimony indicates that he spent only minimal time on his properties involved in this proceeding. It is thus apparent that Mr. Casey has willfully failed to provide sufficient manpower to control

cattle on his ranch. This factor is compounded by the poor conditions of the fences surrounding his private lands in the Susanville District. The record is replete with testimony and photographs that detail the extent of the poor fence conditions. Further, it is apparent from Mr. Casey's testimony that he was aware of the poor conditions in several of the areas concerned. Despite knowledge of the conditions of the fence, he testified that he managed to ride parts of the fences every six months (with some parts more often (Tr. p. 4-307)). Although he testified that the condition of the fences were, in part, caused by factors beyond his control, that is, depredation by either wild horses or by hunters or tourists in the area, such mitigating factors are of little help to respondents absent specific evidence as to the time and place of the depredation leading to specific trespasses involved (see *John Gribble*, 4 IBLA 134, 137 (1971)).

Mr. David E. Iveson, a rancher in the Winnemucca District, testified that in the latter part of July of 1975, he observed a Mr. Lawson open a gate and lead cattle onto the public range within the closure area. He surmised that Mr. Lawson did so to prevent the approximately 40 head from breaking through a fence surrounding his private lands to obtain water (Tr. p. 4-244). He testified that a fence served as a boundary of the closure area and that it had the effect of preventing cattle access to water (Tr. p. 4-247). Mr. Iveson also testified that he personally opened the gate to allow cattle to get water in mid-August, 1975 (Tr. p. 4-253).

Although both of these incidents might, in an applicable case, be sufficient to mitigate an otherwise willful trespass, neither incident helps respondents in this case. The gate was described as being on the east side of the closure area and the cattle would get their water south of the drift fence and on the eastern side of the closure area. The only cattle counted

as being in trespass in July and August, 1975, on the closure area, were three to six miles west of the gate. Thus, from Mr. Iveson's testimony, the cattle counted in trespass were not likely to be the same cattle as those led through the closure area fence.

Further evidence of Mr. Casey's willingness to allow his cattle to trespass is his testimony as to his operation regarding the placement of cattle on the western boundary of the Winnemucca District (where he had a license) with apparent knowledge that the cattle would drift across the District boundary to the Susanville District (where he had no license). (See Tr. pp. 4-181, 182 and 4-307).

Another indication of Mr. Casey's mental state is reflected in his apparent disregard of the conditions of his licensed use on the federal range. He evidently could not remember whether or not he had a license to graze in the Cal-Neva planning unit of the Susanville District in 1975 (Tr. p. 4-300). Another more blatant example of his cavalier attitude toward public land management policy is his apparent disregard of the terms of his licensed use in the Winnemucca District. In defense of the trespasses within the closure area, Mr. Casey claimed that cattle drifted from an area licensed to his use west of the closure area. That area was licensed for winter use only (District Manager's decision dated May 17, 1968), yet most of the trespasses occurred during the summer and fall of 1975. When questioned about grazing west of the closure during a time not authorized by the license, the following dialogue occurred:

"Q (by Mr. Stanley). Isn't it [sic] true that the area is restricted to winter use only?

"A (by Mr. Casey). No, it is not. It is the intention of the Bureau of Land Management that it is, but is the contention of me that it isn't.

"Q. You are aware of a 1968 decision—

"A. Yes, I am, which has never been followed, enforced or had anything else to do with this deal" (Tr. p. 4-325).

Mr. Casey's proclivity is shown to be one of ignoring range practices or rules not comporting with his personal concepts. He has either willfully permitted his cattle to trespass or has willfully failed to restrain them from trespassing, or both.

In addition to being willful in nature, the trespasses are clearly "repeated." As I have previously held, past settlements or trespass damages may be considered in determining the repeated nature of respondents' acts. The record shows that Mr. Casey has a long history of trespass violations commencing in 1956 (Ex. 2) extending through the present case. These actions resulted in decisions being rendered after hearing, and monetary settlement without hearing, involving 74 citations or warning letters against respondents. (Exs. 2-6, 6a). Moreover, even if the previous actions were not considered, I find that facts of the instant case considered alone would more than meet this requirement of being repeated. *Brinkerhoff's* third requirement, that the trespasses occur over a fairly long period of time is also met by these numerous trespasses.

Brinkerhoff's second requirement to justify severe sanctions is that the trespasses involve "fairly large numbers of animals." The *Brinkerhoff* case itself concerned 4 violations involving a total of 88 cattle in 1973 and 3 violations involving 17 cattle in 1974, (plus some violations involving failure to comply with ear-tagging requirements) totaling 21 AUMs (*Brinkerhoff, supra*, at 186, 191) which was characterized as constituting "fairly large numbers." Examining the trespasses set out in the Conclusions section of this opinion, I have found 21 violations totaling 351 animal unit months. This very clearly establishes that this requirement of *Brinkerhoff* has been met.

Concerning *Brinkerhoff's* mention regarding failure to take prompt remedial action, I observe the following. Testimony disclosed that Mr. Casey used 2905 Virginia Street, Reno, Nevada, as his official address for correspondence from BLM. His employees at that address were in-

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structed to hold the correspondence until Mr. Casey picked it up (Tr. pp. 4-178, 353). Mr. Casey testified that he runs ranching operations in Montana and consequently returns to Nevada only on a periodic basis. Accordingly, it may be several days or weeks until actual notice of trespass is received by respondents (Tr. p. 4-177). Thus, under this mode of operation, prompt remedial action to remove cattle from the range is impossible. Mr. Casey testified to the use of two employees over unspecified periods of time but their duties were vague (Tr. pp. 4-205 through 207). The two employees were not called as witnesses and hence their responsiveness in taking prompt remedial action is left in considerable doubt. Positive evidence of lack of prompt remedial action is shown by the length and frequency of the trespasses shown in the complaint. Some trespasses extended over a period of several weeks and were terminated upon recounts of cattle and not upon notification or removal. (See, *e.g.*, Trespass Nos. 86A, 86B, 85). I find from these circumstances that respondents have generally failed to take prompt remedial action concerning abatement of the trespasses.

I therefore find that the trespasses, where proven, are willful in nature, and repeated, and are shown to contain all the elements necessary to justify sanctions, including severe reductions, as permitted by 43 CFR 9239.3-2 as contemplated by the *Brinkerhoff* decision.

Judge Luoma's summation of the evidence leading him to conclude that the trespasses were willful, is as follows (2-77-1, pp. 6-8):

Respondent employed three persons, some of whom worked part time, to supervise operations in the Susanville and Winnemucca Districts (Tr. 311, 314). When served with notice No. 195, Respondent called an employee and told him to rectify the problem; however, nothing was done to abate the trespass (Tr. 319-

322). Others who had received trespass notices rode with Complainant and claimed their cattle. All those involved, including Respondent, were invited to accompany Complainant when the cattle were rounded up (Tr. 148). Respondent's cattle, alone, were impounded.

The fences along the north side of the Rush Creek Ranch were in bad shape, were down in many spots, and Respondent's cattle wandered in and out of the fenced area (Tr. 180-181). Notwithstanding, [*sic*] Respondent left livestock in the Rush Creek Ranch and did not repair the fence. The cattle which were involved in the trespass for which notice No. 203 was issued came from the Rush Creek Ranch (Tr. 326).

The three trespasses which are the subject of this decision were first noticed by Complainant in April 1976. The trespass for which notice No. 180 was issued was terminated because of the turnouts by users, and the trespass for which notice No. 195 was issued was initiated at the end of the summer grazing season when all users were to be off the range (Tr. 96, 97, 159). In fact, Respondent stated that November 1 was a fair date to start the trespass investigation for which notice No. 195 was issued (Tr. 159). In all, 238 cattle were in trespass at times relevant to this proceeding.

Respondent checked some gates in the Winnemucca District fence two or three times a year, however, Respondent did not check all gates. This was notwithstanding that maintenance of the fence is the responsibility of the users (Tr. 29, 327). Respondent concedes that some cattle were found out of fenced fields at various times during the year (Tr. 304, 306).

Respondent did not alleviate the trespass for which notice No. 180 was written (Tr. 318). The trespass for which notice No. 203 was written was terminated because Respondent promised that the cattle in trespass would be rounded up, yet Respondent introduced

no evidence that such a roundup was conducted. In general, Respondent took little action to alleviate the subject trespasses once notified of them (Tr. 316).

Although a subjective determination of intent, willfulness may be shown by evidence that the trespasser did not act in good faith or through innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent. *Eldon Brinkerhoff*, 24 IBLA 324 [83 I.D. 185] (1976).

I find that the subject trespasses were willful because Respondent exercised little control over his cattle and a large number of cattle were in trespass. Upon notification of the trespasses, Respondent did nothing to abate the condition. Respondent's cattle had been found in trespass repeatedly since 1956, many times in the Susanville District. The Rush Creek fence was in disrepair, and gates in the Winnemucca fence were left open, even though it is the duty of the users in those areas surrounding the Susanville Grazing District, of which Respondent was one, to maintain the fences. In effect, Respondent did not act in good faith in maintaining fences or in managing his cattle and the trespasses were the result of Respondent's negligence.

[5] Appellants' arguments fail to demonstrate error in either decision, and we perceive none therein, concerning the issue of willfulness. Appellants' contention with respect to being deprived of a property right without due process is diaphanous, at best. In any event, it has been held that grazing permits issued under section 3 of the Taylor Grazing Act do not create property rights. *United States v. Fuller*, 409 U.S. 488 (1973). Cf. 43 U.S.C. § 1752(a) (1976).

Judge Sweitzer's final order in 2-75-2 reads as follows:

The District Manager of the Susanville District is directed to issue no authorization to Respondents to graze livestock in said District until money damages of \$1,239 are paid.

The District Manager of the Winnemucca District is directed to issue no authorization to Respondents to graze livestock in said District until money damages of \$4,159.05 (\$1,218 for trespass and \$2,941.05 for impoundment costs) are paid.

Each District Manager is directed to thereafter issue no license or permit to graze more than sixty percent (60%) of the authorized active use attached to Respondents' base properties in each District.

The concluding portions of Judge Luoma's decision (2-77-1) are as follows:

PAST HISTORY OF THE TRESPASSES

On Jan. 13, 1956, Respondent's grazing license in the Nevada Grazing District No. 3 was suspended for 3 months (Exh. 22). On Nov. 23, 1960, Respondent's licenses were again revoked and future licenses were denied to Respondent in that district (Exh. 23). A continuous series of 14 trespass citations and warning letters issued to Respondent for the Susanville District, beginning with 1960 and extending into 1968, were noted and itemized in a decision issued on Sept. 4, 1969 (Exh. 24). Nine trespass citations, issued in 1969 for the Susanville District, resulted in a suspension of Respondent's grazing privileges for 5 years. Thirty-five additional trespass citations resulted in additional show cause orders which were either closed through offer of settlement or by a Nov. 17, 1971, agreement between Complainant and Respondent (Exh. 25). Three trespass citations, issued to Respondent in December 1972 and January 1973, were closed through a monetary settlement at twice the commercial rate. Four trespass citations resulted in a decision issued on

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Jan. 7, 1974, which assessed monetary settlement against Respondent at twice the commercial rate (Exh. 26, 28). Nineteen trespass citations were issued from Jan. 17, 1975, through Mar. 19, 1976 in the Susanville and Winnemucca Districts, and one impoundment action was initiated in the Winnemucca District which resulted in a hearing on May 4, 1976. These facts were alleged in Complainant's show cause order and I find that they constitute the record of Respondent's past trespasses.

DAMAGES AND PENALTIES

Where a grazing trespass is not clearly willful, damages are computed at the rate of \$2 per AUM of Federal forage consumed, or the commercial rate, whichever is greater. Where a trespasser commits repeated grazing trespasses, a fine of twice the commercial rate is warranted. Where a grazing trespass is willful, or grossly negligent, suspension, reduction, revocation, or denial of renewal of a grazing license may be warranted. Regulatory factors, together with any mitigating circumstances, however, are to be considered in determining the extent of disciplinary action, 43 CFR 9239.3-2.

To justify a complete revocation of Respondent's grazing privileges the trespasses must be both willful and repeated, involve fairly large numbers of animals, and the trespasses must occur over a fairly long period of time. Finally, Respondent must have failed to take prompt remedial action upon notification of the trespasses.

Since the trespass violations were repeated, the damages must be assessed at twice the commercial rate. The parties established by stipulation that the commercial rate for grazing in the area is \$3.50 per AUM (Tr. 156). Accordingly, damages will be calculated on the basis of \$7 per AUM, as follows:

[For the sake of consistency, we have rounded off fractional AUMs to the next

highest AUM and adjusted Judge Luoma's figures accordingly.]

Trespass No. 180

51 cattle \times .467 mo. $(4/8-4/21) \times 90\%$

F.R. = [22] AUMs \times \$7 = [\$154]

Trespass No. 195

35 cattle \times .533 mo. $(11/1-11/16) \times 90\%$

F.R. = [17] AUMs \times \$7 = [\$119]

80 cattle \times .566 mo. $(11/1-11/17) \times 90\%$

F.R. = [41] AUMs \times \$7 = [\$287]

29 cattle \times .600 mo. $(11/1-11/18) \times 90\%$

F.R. = [16] AUMs \times \$7 = [\$112]

4 cattle \times .633 mo. $(11/1-11/19) \times 90\%$

F.R. = [3] AUMs \times \$7 = [\$21]

[\$539]

Trespass No. 203

39 cattle \times .233 mo. $(1/28-2/3) \times 90\%$

F.R. = [9] AUMs \times \$7 = [\$63]

Total damages = [\$756]

Respondent's cattle comprised 93 percent of the cattle which were rounded up. I find, therefore, that 93 percent of the total impoundment costs should be paid by Respondent. Total impoundment charges were \$5,992.74 and covered the costs for trucking, auction yard expenses, brand inspections, horse rental, per diem and salaries for the employees who went on the roundup, and advertisement costs. Accordingly, the appropriate proportion chargeable to Respondent is \$5,573.25 (Exh. 20).

Finally, I must conclude with full recognition of the severity of such sanction, that Respondent's grazing privileges attached to each of the base properties in the Susanville Grazing District should be permanently revoked. The trespasses were both willful and repeated, involved large numbers of animals, and the trespasses occurred over a long period of time. Respondent's actions evidence no mitigating circumstances upon which a lesser sanction can be based.

ORDER

The District Manager is directed to permanently refuse to issue Respondent

any license or permit authorizing the grazing of livestock upon the Federal range in the Susanville Grazing District. Respondent is directed to pay to Complainant, within 30 days from the date of this decision, total damages of [\$756] for forage consumed while Respondent's cattle were in trespass. Respondent is further directed to pay to Complainant, within 30 days, \$5,573.25 as the proportionate share of impoundment charges.

[6] It is obvious that with respect to the Susanville grazing district the penalties imposed by the two judges conflict. The decision in 2-77-1 directs the permanent revocation of grazing privileges in that district, whereas 2-75-2 directs a 40 percent reduction of such privileges. In order to resolve the conflict, we affirm Judge Luoma's order and set aside so much of Judge Sweitzer's order as concerns appellants' reduction of grazing privileges in the Susanville grazing district. We believe this result is warranted in light of appellants' conduct as demonstrated by both proceedings and the many, many other trespass proceedings involving Casey.

The situation is different with respect to the Winnemucca District. Here, BLM has urged that Judge Sweitzer "did not go far enough" in that he reduced rather than revoked appellants' grazing privileges. The applicable regulation, 43 CFR 9239.3-2 states in relevant part as follows:

A grazing license or permit may be suspended, reduced, or revoked, or renewal thereof denied for a clearly established violation of the terms or conditions of the license or permit, or for a violation of the act or of any of the provisions of this part, or of any approved special rule.

In *Brinkerhoff*, *supra*, at 337, the Board stated with respect to the imposition of sanctions:

Generally, the Department has limited severe reductions of a licensee's or permittee's grazing privileges to cases involving the following elements: (1) the trespasses were both willful and repeated; (2) they involved fairly large numbers of animals; (3) they occurred over a fairly long period of time; and (4) they often involved a failure to take prompt remedial action upon notification of the trespass. *United States v. Casey*, 22 IBLA 358, 369, 82 I.D. 546 (1975); see *John E. Walton*, 8 IBLA 237 (1972); *Eldon L. Smith*, 8 IBLA 86 (1972); *Alton Morrell and Sons*, *supra* [72 I.D. 100 (1965)]; *L. W. Roberts*, A-29860 (April 23, 1964); *Clarence S. Miller*, 67 I.D. 145 (1960); *Eugene Miller*, 67 I.D. 116 (1960); *J. Leonard Neal*, 66 I.D. 215 (1959). A severe reduction may be a permanent loss of grazing privileges or a temporary loss of significant privileges for a period of years. [Italics in original.]

In our view, the regulation and the case law are so flexible as to permit alternative sanctions of varying degrees of severity. We have previously quoted that portion of Judge Sweitzer's decision in which he set forth his rationale (referring to *Brinkerhoff*) for imposing his sanctions. We believe that the reduction, rather than revocation of grazing privileges ordered by him was well within his discretion under the circumstances and comports with the regulation. We point out again that the regulation offers alternatives; it does not *mandate* revocation rather than reduction of privileges under a particular set of facts. BLM's urging that Judge Sweitzer's decision "did not go far

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enough" in this respect, is, in the absence of specific error, insufficient reason for the Board to substitute its judgment for that of Judge Sweitzer as far as the Winnemucca grazing district is concerned.

Conclusion

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1:

a) The chief administrative law judge's decision in 2-77-1 is affirmed, except that the damages figure for trespasses is modified from \$735.70 to \$756.

b) The administrative law judge's decision in 2-75-2 is modified, with respect to the Susanville grazing district in that the district manager of said district is directed to permanently refuse to issue appellants any license or permit authorizing the grazing of livestock in said district.

c) The administrative law judge's decision in 2-75-2 is further modified to reflect a total of \$1,463 in monetary damages due for trespasses in the Susanville District.

d) The remaining portions of Judge Sweitzer's order in 2-75-2 are affirmed.

FREDERICK FISHMAN,
Administrative Judge.

I CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

ADMINISTRATIVE JUDGE STUEBING CONCURRING:

While I concur fully in the majority opinion, including the modification of Judge Sweitzer's decision insofar as he allowed a deduction for those cattle which were observed on private lands with access to nearby public land, I would like to comment further on this point.

Judge Sweitzer noted:

[T]he areas of land involved could have a bearing on the validity of the presumption that cattle considered as a whole, would obtain a percentage of their forage from the public lands. In the instant case, respondents control extensive holdings in the Cal-Neva Common Allotment and the effect of a strict application of the rule in *Babcock* could conceivably have a devastating impact on the use of respondents' private lands. For example, if but one cow of a herd of several hundred should stray through a break in a fence surrounding a large private ranch, the government might consider the fence as ineffective and trespass the entire herd. * * *

Many factors other than fences (such as the quality and quantity of forage, salt licks, availability of water, and terrain features) may limit the movement of cattle from private to public lands.

I regard this as a cogent observation, and an important consideration to be taken into account in all such cases. Certainly it is not our intention to interdict or inhibit the legitimate use of private land for grazing.

When cattle are turned out on private land with access to public land, the question of whether they

do or do not derive some of their sustenance from foraging in trespass on the public land becomes a question of probabilities, as revealed by the evidence. Cattle seem unable to comprehend even the rudimentary concepts of the laws relating to real property, and have a notorious penchant for preferring their neighbor's grass.¹ So, if the evidence does not show that there are factors which make it unlikely that they range beyond their own boundaries, it must be presumed that they do.

The same factors might be considered in evaluating what proportion of their monthly forage is consumed in trespass. For example, if there is a terrain barrier a short distance beyond the boundary of the Federal land, it should not be presumed that the trespass extends beyond it. Or, if there is water in the center of a large tract of private land, and none on the adjacent Federal land, the ranging radius of cattle around their water source, as established by the evidence, should indicate whether, or to what extent, the cattle could be expected to intrude on the Federal land. The

same factors might also be considered in determining whether a trespass was willful. For example, if despite the presence of physical impediments, large numbers of cattle are found deep in Federal land, far beyond where they would normally range of their own accord, a presumption arises that they were probably driven there.

The purpose of this dissertation is to dispel any notion that the mere presence of cattle on a parcel of unfenced or poorly fenced private land is, of itself, conclusive evidence that those cattle derive a portion of their sustenance by grazing in trespass on adjacent land.

However, in this instance, I am not persuaded by the evidence that the Casey cattle observed on private land were effectively limited to their own private range, and that the overwhelming probability is that they did in fact derive some of their sustenance by grazing in trespass. For this reason, with full respect for Judge Sweitzer's rationale, I concur in the majority's modification of his holding on this point.

EDWARD W. STUEBING,
Administrative Judge.

¹ "The grass is always greener on the other side of the fence." Anon.

December 12, 1978

**THE EFFECT OF PUBLIC LAND
ORDER 82 ON THE OWNERSHIP OF
COASTAL SUBMERGED LANDS IN
NORTHERN ALASKA***

M-36911

December 12, 1978

**Withdrawals and Reservations: Effect
of**

Public Land Order 82, issued in 1943, which withdrew from "sale, location, selection and entry" certain described "public lands" in the Territory of Alaska, could include coastal and inland submerged lands, if such were the intent of the Order.

**Withdrawals and Reservations: Effect
of**

Where the language of a withdrawal Order is unclear as to whether submerged lands were included in the Order which withdrew certain lands in the Territory of Alaska from "sale, location, or entry," the withdrawal should be construed to carry out its intent and purpose.

**Withdrawals and Reservations: Effect
of**

Where the description in the withdrawal Order affecting lands in the Territory of Alaska is ambiguous, but can be interpreted to exclude coastal submerged lands, and where other evidence exists which tends to indicate that coastal submerged lands were not intended to be included in the Order, the Order will be construed to exclude coastal submerged lands.

**Withdrawals and Reservations: Effect
of**

Where evidence exists that a withdrawal of certain lands in the Territory of Alas-

ka intended to include inland submerged lands, and such submerged lands are not specifically excepted from the withdrawal, the withdrawal will be construed to include inland submerged lands.

**Withdrawals and Reservations: Effect
of—Submerged Lands Act: Generally**

Where submerged lands were included in a withdrawal Order in Alaska, which was in effect at the time the State entered the Union, even though such submerged lands were not specifically described in the withdrawal Order, such submerged lands would not pass to the State at Statehood pursuant to sec. 5(a) of the Submerged Lands Act.

**Withdrawals and Reservations: Effect
of—Submerged Lands Act: Generally**

The subsequent revocation of a withdrawal of submerged lands which prevented the State from acquiring title to such lands at Statehood pursuant to sec. 5(a) of the Submerged Lands Act, has no effect on the ownership of the lands contained in the withdrawal.

**Withdrawals and Reservations: Effect
of—Submerged Lands Act: Generally**

Where the coastal submerged lands in the Arctic National Wildlife Refuge were segregated by an application for a withdrawal filed by the Fish and Wildlife Service in January 1958, one year before Alaska statehood, such application operated as an express retention of the lands at statehood under the Submerged Lands Act, and prevented passage of title of the coastal submerged lands to the State.

This Opinion overrules Opinion of Deputy Solicitor, Aug. 21, 1959, M-36562.

*Not in Chronological Order.

OPINION BY OFFICE OF THE SOLICITOR

TO: SECRETARY

FROM: SOLICITOR

SUBJECT: THE EFFECT OF PUBLIC
LAND ORDER 82 ON THE OWNER-
SHIP OF COASTAL SUBMERGED
LANDS IN NORTHERN ALASKA

I. INTRODUCTION AND SUMMARY

This memorandum discusses the impact of Public Land Order 82 (Jan. 22, 1943), published in 8 FR 1599 (Feb. 4, 1943) (hereafter PLO 82), on the current ownership of (1) offshore submerged lands¹ and (2) inland submerged lands² in northern Alaska.

Current ownership depends on (1) whether PLO 82 withdrew lands in either category; (2) if so, whether this withdrawal effectively prevented transfer of federal ownership to the State of Alaska upon statehood³; and (3) if so, whether

¹ "Offshore submerged lands" as discussed in this opinion refers to those submerged lands underlying the waters of the Arctic Ocean off northern Alaska, including the lands underlying the bays and capes below the mean high tide line on the actual or physical, as opposed to constructive or legal, coastline.

² The only inland submerged lands in issue here are those underlying navigable waters. There is no question that the beds of non-navigable waters remained in United States' ownership at the time of statehood. See Davis, *State Ownership of Beds of Inland Waters—A Summary and Reexamination*, 57 Neb. L. Rev. 665-66 (1978).

³ The Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 (1970), exempted certain categories of lands from the general grant it made of lands to the states. The Submerged Lands Act applies to Alaska pursuant to the Alaska Statehood Act, July 7, 1958, Pub. L.

revocation of PLO 82 in 1960 vested ownership of the lands in the State. This memorandum considers these questions in order.

The question of the impact of PLO 82 is of substantial importance. The mineral wealth—especially oil and gas—of the coastal submerged lands is thought and to some extent known to be considerable. On the assumption that it has title to at least some of these lands, the State of Alaska has leased some of the reserves, notably in Prudhoe Bay and its environs, to private energy companies for development. If the Federal Government owns these lands, then these leases are *ultra vires* State action, and consequently without effect to the extent inconsistent with federal ownership.

The basic issue of the extent of the withdrawal made by PLO 82 and its effect on State ownership has been acknowledged inside the Department of the Interior for several years.⁴ The issue involving

No. 85-508, 72 Stat. 339, 48 U.S.C. note preceding § 21. This issue is discussed at pp. 170-172, below. Alaska was admitted to the Union on Jan. 3, 1959, Proc. No. 3269, 24 FR 81.

⁴ The matter first surfaced in the context of whether the State's selection of lands in the bed of the Colville River (which is within the area withdrawn) should be charged against the State's entitlement under the Statehood Act. The Bureau of Land Management (BLM) in fact did so. The question was also discussed internally in the Department in connection with a dispute between the Department and the State concerning the coastal boundary of the Naval Petroleum Reserve No. 4.

Since PLO 82 was revoked, the State of Alaska has made selections under the Alaska Statehood Act of submerged lands underlying the bed of the Sagavanirktok River, near its mouth where it is generally conceded to be navigable. On the other hand, the State has not selected submerged lands under the waters of Prudhoe Bay, apparently on the rationale

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coastal submerged lands has been raised in connection with a proposed sale of oil and gas resources in submerged lands in the Beaufort Sea off northern Alaska, which would be a joint sale conducted by the Department and the State. The need to clarify the status of the ownership in connection with this proposed joint sale has been the catalyst which has prompted this opinion.

Based on the following discussion, I have concluded that the coastal submerged lands were not withdrawn by PLO 82. Consequently, the lands passed to the State of Alaska upon statehood pursuant to the Submerged Lands Act and the Alaska Statehood Act, with the exceptions noted below. I have also determined that, in contrast to the

coastal submerged lands, the inland submerged lands were withdrawn by PLO 82, did not pass to the State of Alaska at statehood, and remain in federal ownership despite the revocation of PLO 82 in 1960, except where the State of Alaska has selected the submerged lands in question and the Federal Government has approved these selections.⁵ Offshore submerged lands which did not pass to the State upon statehood are those submerged lands reserved by Executive Order 3797-A dated Feb. 23, 1923, with regard to the Petroleum Reserve No. 4, and those submerged lands segregated by the Bureau of Sport Fisheries and Wildlife Application dated Jan. 14, 1958, with regard to the Arctic National Wildlife Range.

II. THE MEANING OF PLO 82

On Jan. 22, 1943, Acting Secretary of the Interior Fortas issued PLO 82. (A copy is attached as Exhibit A.) It withdrew from "sale, location, selection, and entry" certain described "public lands" in the Territory of Alaska, and also "reserved" the minerals in these lands. The Order was made subject only to "valid existing rights."

The Order reads in relevant part, as follows:

⁵ Because these lands are north of the so-called "PYK" line, the President must approve these selections before they are effective. See § 6(b) of the Alaska Statehood Act; 48 U.S.C. Note preceding § 21.

F.N.4—Continued

that title to that submerged land passed to it at statehood by operation of the Submerged Lands Act.

The question of PLO 82's effect on submerged lands under inland navigable waters is also currently pending before the Department's Alaska Native Claims Appeal Board (ANCAB), in connection with the State's challenge of a Departmental conveyance of certain lands in the bed of the Colville River to the Kuugpik Village Corp. under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* (Supp. V, 1975) (ANCSA). The Department argues that the land was properly conveyed because PLO 82 effectively reserved it to federal ownership upon statehood. Alaska, however, claims that PLO 82 did not validly reserve title to such lands and, therefore, they passed to the State at statehood. (*Appeal of Alaska*, ANCAB #VLS 78-32) (This position appears inconsistent with the State's selection of lands underlying inland navigable waters, because there is obviously no need to select what is already in State ownership.)

WITHDRAWING PUBLIC LANDS FOR USE IN CONNECTION WITH THE PROSECUTION OF THE WAR

By virtue of the authority vested in the President and pursuant to Executive Order No. 9146 of April 24, 1942, *It is ordered as follows:*

Subject to valid existing rights, (1) all public lands, including all public lands in the Chugach National Forest, within the following described areas are hereby withdrawn from sale, location, selection, and entry under the public land laws of the United States, including the mining laws, and from leasing under the mineral-leasing laws, and (2) the minerals in such lands are hereby reserved under the jurisdiction of the Secretary of the Interior, for use in connection with the prosecution of the war:

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All that part of Alaska lying north of a line beginning at a point on the boundary between the United States and Canada, on the divide between the north and south forks of Firth River, approximately latitude 68 degrees 52' N., longitude 141 degrees 00' W., thence westerly, along this divide, and the periphery of the watershed northward to the Arctic Ocean, along the crest of portions of the Brooks Range and the De Long Mountains, to Cape Lisburne.

The area described, including both public and nonpublic lands, aggregates 48,800,000 acres.

* * * * *

This order shall not affect or modify existing reservations of any of the lands involved except to the extent necessary to prevent the sale, location, selection, or entry of the above-described lands under the public land laws, including the mining laws, and the leasing of the lands under the mineral-leasing laws.

A. Meaning of "Public Lands" in Alaska

PLO 82 expressly withdrew "all public lands * * * in the following

described area * * *." The geographical extent of PLO 82 should be governed by the contemporaneous intent of the Department in withdrawing and reserving "public lands". See, *Udall v. Oelschlaeger*, 389 F. 2d 974 (D.C. Cir. 1968); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). Because PLO 82 itself expressly withdrew only *public lands* and the minerals in those lands, we must consider whether this term was intended to limit, or in fact limited, the effect of the order to the uplands.

1. Status of Submerged Lands Prior to PLO 82 in 1943

Historically under the common law, submerged lands have been treated differently from uplands. As successors to the English Crown, the thirteen original states acquired title to the beds of navigable rivers. *Martin v. Waddell*, 41 U.S. 367 (1842). In federal territories, however, the United States held title to such lands in its capacity as territorial sovereign. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). Once the state entered the Union, title to lands beneath navigable waters was held to vest in the state. *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894). Thus, lands beneath navigable waters in states were not subject to grants by the United States. *Barney v. Keokuk*, 94 U.S. 324 (1876).

In *Shively*, which concerned a private party's claim that he had been granted a portion of the bed of the (navigable) Columbia River by the United States while the area

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was a territory, the Court acknowledged that the United States had the constitutional authority to make such grants of land beneath navigable waters to private persons while the area was in territorial status:

By the Constitution, as is now well settled, the United States having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition.⁸

Concerning the precise point at issue here, the validity of a retention of submerged lands underlying inland navigable waters for a federal reservation, as against the claims of a subsequently created state, was specifically recognized in *Montana Power Co. v. Rochester*, 127 F. 2d 189 (9th Cir. 1942). Citing *Shively*, the court stated that

⁸ *Ibid.* See also *Goodtitle v. Kibbe*, 9 How. 471, 478 (1849). The Court in *Shively* went on, however, to observe that the United States had never undertaken "by general laws" to dispose of such lands to private parties. 152 U.S. at 48-50, 58. *Shively* represented a departure from earlier decisions of the Supreme Court which had suggested that the United States had no power to grant away these tidelands to individuals during the territorial period prior to admission of a state. See 152 U.S. at 47. Once the Court made clear in *Shively* that Congress had the power to make grants of these lands during the territorial period, claimants were quick to seize upon the provisions of the general land laws as congressional authority for their tidelands claims. Such claims were rejected in *Munn v. Tacoma Land Co.*, 153 U.S. 273 (1894); *Morris v. U.S.*, 174 U.S. 196 (1899); *Scott v. Carew*, 196 U.S. 100 (1905); *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935).

[c]learly, the United States in the exercise of its sovereign power had the right to deal with the lands below high water mark as it saw fit, * * * and the treaty leaves no room for doubt that the government chose to hold the entire area, submerged lands no less than uplands, in trust for the Indians rather than for the future state to be carved out of the region.

Id. at 191. The case of *United States v. Holt State Bank*, 270 U.S. 49 (1926) is not inconsistent with this. There the Supreme Court held that there was no intention on the part of the United States to reserve the bed of a navigable lake in a territory for the benefit of the Chippewa Indians; therefore, the bed of the lake passed to the state upon statehood. See 270 U.S. at 58.

Thus, it was well settled that the submerged land during the territorial period was property of the United States, subject to retention or disposal by Congress. U.S. Const., Art. IV., Sec. 3, Cl. 2.

2. *Effect of Withdrawals of Public Lands in Alaska on Submerged Lands Prior to PLO 82 in 1943*

Although Congress had not, up to the time of PLO 82, enacted general legislation which treated submerged lands as public lands,^{9a}

^{9a} Congress had, of course, enacted the Mineral Leasing Act in 1920. At the time PLO 82 was issued, it had not been finally determined by the Department or the courts whether this authorized the issuance of leases for submerged lands. See p. 159, *infra*. The Department had in fact issued permits for coastal submerged lands under this Act. See p. 167, *infra*.

we must examine whether public lands in Alaska had ever included submerged lands. There are two items of relevance here. The first is a 1918 Supreme Court decision which, in *dictum* and general approach, might be construed as suggesting that "public lands" include submerged lands. The second, and more precisely in point, is the 1937 Solicitor's Opinion which concluded (citing that earlier Supreme Court decision) that water and submerged lands might be reserved in Alaska under a statute authorizing the reservation of "public lands" for Indians or Eskimos. These will be discussed in turn.

In 1918, twenty-five years before PLO 82, the Supreme Court considered whether an Act of Congress setting aside "the body of *lands* known as Annette Islands" (*Italics added*) in Alaska included the *waters* overlying coastal submerged lands. The Congressional withdrawal had been for the benefit of the Metlakatla Indians who were peculiarly dependent on the fisheries in the adjacent waters of the Pacific Ocean. Subsequently an extensive fishtrap, designed to catch about 600,000 salmon, was erected by Alaska Pacific Fisheries, a California corporation, in the navigable waters off the coast of the islands. The question before the Court was whether Congress intended to embrace only the uplands of the islands or whether it intended also to include adjacent waters (over the coastal submerged lands) for the Indians. Concerning

the authority of the United States to deal with these waters, the Court noted (referring, in *dictum*, to adjacent submerged land as well as waters):

That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority.

248 U.S. at 87. Looking to Congressional intent, the Court found that a major purpose of the Act was to make the Metlakatlans self-sustaining. Finding that the Indians could not sustain themselves from the use of the uplands alone, the Court found that the Congress intended "the body of lands known as Annette Islands" to include the surrounding waters. *Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 89 (1918).

Although the key question was the intent of Congress in making the designation of a "body of lands," and the Court's holding went only to adjacent waters, *Alaska Pacific Fisheries* could be construed as containing a suggestion to the drafters of PLO 82 that they had authority to include coastal submerged lands in the "public lands" of northern Alaska being withdrawn by PLO 82 to prevent interference with federal oil and gas exploration and development.

Nineteen years later, the Department's Solicitor issued an opinion on the authority of the Secretary to

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"reserve waters in connection with, and independently of, land reservations for Alaskan Natives under the Act of May 1, 1936." 56 I.D. 110 (1937). The 1936 Act had extended the Indian Reorganization Act to Alaska, and authorized the Secretary to reserve, among other things, "public lands" adjacent to lands previously reserved for Indians or Eskimos, or other "public lands" actually occupied by Indians or Eskimos.

The Solicitor, whose opinion was approved by the Secretary, decided that the Act authorized the reservation of water adjacent to any lands already reserved or being reserved for the Natives. The opinion cited the decision of the Supreme Court in *Alaska Pacific Fisheries*, and observed:

The term "public lands" is synonymous with the term "public domain," and the tidewaters of the territories of the United States and the lands under them have been classified as part of the public domain since they belong exclusively to the United States Government and are subject to its disposition.⁷

This decision, coming six years before PLO 82, provides reasonably direct support on which the drafters of PLO 82 could have relied in reserving both the inland and the coastal submerged lands in northern Alaska as "public lands."

⁷ 56 I.D. at 114. The Solicitor cited *Alaska Pacific Fisheries* and *Shively v. Bowlby* for this proposition.

3. Summary of Status of "Public Lands" as Including Coastal and Inland Submerged Lands in 1943

The above discussion shows that the courts have long recognized an inherent sovereign power of the United States over land in territories, including submerged lands. A published Solicitor's opinion had concluded that "public lands" in Alaska did, in the specific circumstances studied, include submerged lands and the waters over those lands.

The common Departmental understanding in 1943 regarding Alaska is what we must assess, and it was entirely possible for the drafters of PLO 82 to assume that "public lands" included coastal submerged lands and submerged lands under inland navigable waters, especially if that construction would have furthered the purpose of the withdrawal. The purpose of the withdrawal is discussed below at pp. 164-169.

4. Summary of Events Relating to the Issue After 1943

Judicial decisions and Congressional action after 1943 obviously could not have affected what was intended to be withdrawn by PLO 82 in 1943. Yet as these subsequent actions interpret the limitations posed by the use of the term "public lands," these actions are relevant to the power of the Secretary to in-

clude submerged lands as "public lands," and I will discuss them briefly.

In *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), the Court was concerned with the Secretary's designation of an Indian reservation for the use and benefit of the native inhabitants of Karluk, Alaska. The reservation included certain lands and "waters adjacent thereto extending 3,000 feet from the shore line." The 1936 statute under which the reservation was made authorized the Secretary of the Interior to designate as an Indian reservation and to add "additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory."⁸

The Supreme Court found that the Secretary was acting under sec. 2 of the Act of May 1, 1936 and under Executive Order 9146 in making the withdrawal. Both authorities are restricted to "public lands." See 337 U.S. at 101. The Court listed five reasons for deciding that the Secretary was authorized to include coastal submerged lands in the withdrawal of public lands:

Taking into consideration the importance of the fisheries to the Alaska natives, the temporary character of the reservation, the Annette Islands case, the administrative determination, the pur-

pose of Congress to assist the natives by the Alaska amendment to the Wheeler-Howard Act, we have concluded that the Secretary of the Interior was authorized to include the waters in the reservation. No injunction therefore may be obtained because of the invalidity of Order No. 128.

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Some of these reasons were equally applicable to the withdrawal of coastal submerged lands in PLO 82. For example, the importance of possible oil resources in the submerged lands to the war effort could have been considered (see pp. 164-169, *infra*) and PLO 82 was itself a temporary reservation. And the Court cited and reaffirmed the pre-PLO 82 *Alaska Pacific Fisheries* holding (the "Annette Islands case"). Overall, this case is significant in manifesting a continuing attitude by the Supreme Court not to accord talismanic significance to the words "public lands," but instead to recognize in some instances that the term "public lands" as used in Executive Order 9146 (the legal basis for PLO 82) can include submerged lands.

Twenty-one years later, the Ninth Circuit considered the effect of Executive Order No. 8979, issued by President Roosevelt on Dec. 6, 1941, which created the Kenai National Moose Range. *U.S. v. Alaska*, 423 F. 2d 764 (9th Cir. 1970). The Order refers to "hereinafter-described areas of land and water of the United States," rather than to "public land." The State of Alaska argued that the withdrawal was ineffective as to navigable water of

⁸ Act of May 1, 1936, 49 Stat. 1250-51. This section of the 1936 Act was the one the Solicitor had interpreted in 1937 to allow reservation of water adjacent to lands reserved for the Natives. See 56 I.D. 110 (1937), discussed at pp. 156-157, *supra*. The Supreme Court in fact cited the Solicitor's Opinion in its discussion. See 337 U.S. at 114.

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the Moose Range, but the Court pointed out that failure to withdraw water or land under the water would nullify the purpose of the Order because the moose depended on the waters within the Range for their existence.⁹

The Court found the intent to withdraw both waters and lands underlying Lake Tustumena to be very plain. In reaching its conclusion, the Court observed: "In construing the pertinent Alaskan statutes, the courts have consistently held that the words 'public domain', 'public lands' and 'lands', include land under water." 423 F. 2d at 766. As noted, the Order itself refers to both "land and water of the United States." This case also makes clear that submerged lands can be withdrawn and retained in federal ownership for a governmental purpose in a context not involving the government's trust responsibility to Indians and Eskimos.

No post-1943 development has suggested that the public lands do not include the beds of *inland* navigable waters. There were, however, post-1943 developments which es-

tablished the principle that Congress had not generally extended the public lands to include *coastal* submerged lands adjoining states. See, e.g., 60 I.D. 26 (1947), a Solicitor's Opinion holding that the Mineral Leasing Act of 1920 does not authorize the issuance of oil and gas leases with respect to the submerged lands off the coasts of the United States. This opinion was upheld by the Court of Appeals in *Justheim v. McKay*, 229 F. 2d 29 (D.C. Cir. 1956), *cert. den.* 351 U.S. 933 (1956). See also Solicitor's Opinion M-36084 (June 25, 1951) holding that selections of coastal submerged lands under various types of land scrip must be rejected in part because "public lands" as used in the federal statutes authorizing selections based on such scrip does not include coastal submerged lands.

From this review of post-PLO 82 developments, it is apparent that the question of whether the public lands in Alaska could include inland or coastal submerged lands has continued to turn on the language and purpose of the specific withdrawal at issue. It is that language and purpose which we must now examine in more detail.

B. PLO 82's Description of the Area Withdrawn

1. Coastal Submerged Lands

The language of the Order in question does not specifically de-

⁹ "Appellees would have the male and female of this semi-aquatic animal find each other and mate in dense woods and thickets, and on precipitous mountains and cliffs, rather than in or around the tranquil waters of their native habitat. President Roosevelt never intended such a result, nor did he envision the bulls and cows of this noble group standing on the shores of streams and lakes and there extending their necks to giraffelike proportions in order to enjoy the aquatic vegetation so essential to their continued existence." 423 F. 2d at 767.

scribe the northern boundary of the area withdrawn. The section is captioned simply "Northern Alaska," without stating a northern limit. The portion of the text which concerns the extent of the public lands withdrawn reads as follows:

All that part of Alaska lying north of a line beginning at a point on the boundary between the United States and Canada * * * thence westerly along this divide, and the periphery of the watershed northward to the Arctic Ocean, along the crest of portions of the Brooks Range and the DeLong Mountains, to Cape Lisburne.

The operative part of the description says the withdrawal covers "[a]ll [the public lands¹⁰ in] that part of Alaska lying north of [the line drawn in the order]." (Italics added.) This language is broad enough to cover the coastal submerged lands, assuming that "public lands" includes submerged lands, an issue which is discussed above in terms of legal authority (Part I.A) and which is discussed below in terms of Departmental intent (Part I.C).

The description goes on to define the southern boundary line of the withdrawal area as beginning on the Canadian border and running "thence westerly along this divide, and the periphery of the watershed northward to the Arctic Ocean * * * to Cape Lisburne." (Italics added.) This language defines the southern boundary in terms of the

watershed which runs northward to the Arctic; i.e., the southern line is fixed at that point where water runs north rather than south. If the language were meant to limit the withdrawal to the watershed lying "northward to the Arctic Ocean," the limitation would need to come at the beginning or end of the withdrawal language to be correct grammatically, and not in the middle of the definition of the southern boundary.

The language "northward to the Arctic Ocean" appears to be used only in the context of defining the southern boundary line. It is possible, however, to conclude that the language in fact described the intended northern boundary as well (at the shoreline of the Arctic Ocean) even though such a construction would be grammatically incorrect. It is worthy of note that the language is the *only* reference in the order that potentially fixes a northern boundary, other than the boundary of U.S. ownership under international law.¹¹

The western end of the southern boundary is described as "to Cape Lisburne" (italics added). Cape Lisburne ends by definition at water's edge. This language might suggest that the withdrawal did not extend beyond land's end and that

¹⁰ This part of the Order merely refers to all that part of northern Alaska; however, the beginning of the Order states that it withdraws "all public lands * * * in the following described areas. * * *"

¹¹ The entire federal ownership as of 1943 was somewhat unclear. The United States had historically claimed ownership to at least three miles offshore. It was not until the Truman declaration in 1945 that the United States formally asserted jurisdiction and control over the entire Continental Shelf. See, Exec. Proc. 2667, Sept. 28, 1945, 10 F.R. 12303; see also *United States v. Calif.*, 332 U.S. 19 at 23-34 (1947).

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coastal submerged lands were not included. But Cape Lisburne is the western, not the northern boundary, and it is the northern boundary which is in question. Because the coastline extends directly south and east from Cape Lisburne, and because the Order withdrew "all that part of Alaska" extending north of the line which terminates at Cape Lisburne, there is not necessarily a gap between Cape Lisburne and the boundary of the coastal submerged lands. From Cape Lisburne, in other words, the boundary of the coastal submerged lands extends due north.

Other parts of PLO 82 withdrew public lands on the Alaska Peninsula and in the Katalla-Yakataga area. Regarding the Alaska Peninsula withdrawal, the Order describes the marine boundary, in pertinent part, as "*along the Pacific Ocean * * * along the south shore of Tuxedni Bay [and] along * * * the shores of Kuichak Bay and Bristol Bay * * **" (Italics added.)

The description of the Katalla-Yakataga area reads, in pertinent part: "** * * to the Gulf of Alaska * * * [and] along the Gulf of Alaska. * * **" Although this description is more ambiguous than in the case of the Alaska Peninsula because it does not expressly refer to "the shore of" the Gulf of Alaska, it does establish a limit "along the Gulf. * * *"

Express placement of the boundary along the shore and the Gulf

suggests, where this expression is not used, an intention to include coastal submerged lands.

The descriptive language of PLO 82 might be construed broadly enough to include coastal submerged lands in the northern Alaska withdrawal, assuming that the term "public lands" includes coastal submerged lands. Such lands were specifically excluded in other parts of the order. But the order can be read ("northward to the Arctic Ocean") to limit the withdrawal to the coastline of the Arctic Ocean. Because the descriptive language of the area withdrawn is somewhat ambiguous, however, I must examine other evidence of the drafter's intent.

A search of the Department's files for a map and other direct evidence of the area intended to be withdrawn has not yielded conclusive results. A map indicating the three areas withdrawn was found in a Department file folder¹² which includes several PLO 82-related documents bearing dates between 1940 and 1960. It is a 1940 Map of Alaska showing the three areas withdrawn by PLO 82 in yellow. The yellow coloring does not indicate that any of the submerged lands off northern Alaska were included. The yellow coloring on this map appears to be rather imprecisely done, however.

¹² This folder was found in BLM File #1941468.

For example, coastal submerged lands underlying Icy Bay in the Katalla-Yakataga are indicated in yellow, as are most (but not all) of the submerged lands beneath lakes. The memorandum found in the same folder as the map provides no assistance in the matter, and we have been unable to determine whether that map was the one used in connection with the decision to issue PLO 82. On the other hand, the map does reflect the understanding of someone in the Department that offshore submerged lands were excluded and onshore submerged lands were generally included in the withdrawal.

In the same file, however, there is also a 1957 map showing the area withdrawn which was used in connection with a proposed modification of PLO 82. The map appears to include the northern coastal submerged lands in PLO 82. The map was prepared, of course, more than a decade after PLO 82 was issued in 1943, and does not necessarily reflect the Department's understanding of the effect of PLO 82 when it was issued.

Finally, the Department prepared and published in July 1958 a large book of existing land withdrawals and reservations in Alaska. *Alaska, Federal Withdrawals and Land Reservations*. Obviously prepared in connection with statehood deliberations (and published by the Government Printing Office in bound form the same month that Congress completed action on the Statehood Act), it shows PLO 82

as extending beyond the coastline to include coastal submerged lands.

Another piece of evidence to be considered is the 48,800,000 acre figure cited in PLO 82 for the northern Alaska withdrawal. This acreage figure includes both "public and non-public lands," and thus cannot be used by itself to determine the acreage of "public lands" which were withdrawn; however, the figure may be useful in determining whether the perimeter of PLO 82 included coastal submerged lands.

At the request of my office, the Cadastral Survey of the Bureau of Land Management recently performed the following analyses, using three different maps of Alaska: the 1940 map with yellow coloring found in the BLM file, the 1942 Geological Survey map of Alaska, and, for sake of further comparison, a 1954 Geological Survey map of Alaska (even though the 1954 map was published eleven years after PLO 82 was issued). The 1942 map was the largest and best available USGS map at the time PLO 82 was issued and is probably the most likely one to have been used in preparing PLO 82 (even though we have uncovered no evidence that it, or any other map, for that matter, was actually used).

To create the southern boundary as described in PLO 82, lines were drawn on each map connecting peaks of the Brooks Range and the De Long Mountains to Cape Lisburne. Three different northern boundaries were used: (a) the up-lands to the actual coastline; (b)

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the uplands to the coastline, but closing the bays along the shore to include the area in the bays with the uplands; and (c) the uplands and coastal submerged lands to three miles offshore. A Wang Digitizer then determined the included acreage between the southern boundary and the three different northern boundaries.

The derivation of the acreage figure used in PLO 82 is not known. The technology now used to make such estimates was not available in 1943. The Cadastral Survey cautions that even today, determining acreage from maps by planimetry is subject to such variables as map

accuracy, scale, projection and stability, as well as planimeter accuracy and operator efficiency.

Because none of the maps used are topographical, the southern boundary had to be drawn freehand through the spot elevations and between the river headwaters referred to in PLO 82. Moreover, judgment had to be exercised in determining the coastal boundary around the fringing islands and across the capes on the northern coast. For these reasons, Cadastral Survey believes that its estimates are "probably" subject to an error of 5%.

The following table shows the results:

Area covered	Map	Acreage (millions)
Uplands ¹ to actual coastline-----	1940	53.7
	1942	52.1
	1954	52.5
Uplands ¹ to coastline plus bays-----	1940	54.4
	1942	52.6
	1954	53.3
Uplands ¹ and coastal submerged lands-----	1940	55.9
	1942	55.8
	1954	56.7

¹ The uplands includes all submerged lands, whether under navigable or non-navigable waters. Most of the thousands of water bodies in northern Alaska have not yet been determined to be navigable or not.

None of the acreage figures for any map or area measured shows a correlation with the 48,800,000 acre figure used in PLO 82. Given the

difficulties in using current techniques to make such measurements, the lack of technology in 1943 to make such measurements, the lack

of large, detailed maps in 1943 of northern Alaska, and the complete absence of information about how the PLO 82 acreage figure was derived, and whether any map was used, I can only conclude that the acreage figure used in PLO 82 was an educated guess, and that current measurement techniques applied to old maps cannot measurably assist our inquiry.

In sum, although the face of PLO 82 is ambiguous regarding whether coastal submerged lands were included, and the key language of the Order ("to Cape Lisburne" and "to the Arctic Ocean") can be read either way, on balance, I believe the better interpretation is that coastal submerged lands were excluded.

2. Inland Submerged Lands

As noted in the preceding discussion, the portion of PLO 82 which describes the area withdrawn is captioned "Northern Alaska." The specific description of the extent of the area withdrawn begins with the phrase "[a]ll that part of Alaska" and then proceeds to specifically describe the southern boundary of the withdrawn area. Because of the sweeping language used to describe the area withdrawn, a strong argument exists that in order to construe PLO 82 as excluding inland submerged lands from the withdrawal, a specifically-worded exception to that effect would have to be apparent from the face of the Order.¹³ Other than the Order's

concession to "valid existing rights," no exceptions from the area withdrawn are stated in PLO 82. The 1940 map also provides some indirect evidence that inland submerged lands were intended to be included. There is no evidence whatsoever to the contrary.

C. Intent and Purpose of PLO 82

Public Land Orders, like Presidential and Congressional withdrawals, should be construed to carry out the intent and purpose in making the withdrawal. See, e.g., *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 115 (1949); *U.S. v. State of Alaska*, 423 F. 2d 764, 767 (9th Cir. 1970); see also *Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 87 (1918). The essential inquiry was described by the Supreme Court in *Alaska Pacific Fisheries*, *supra*, regarding withdrawal of "intervening and surrounding waters as well as the uplands" for the benefit of Indians, as follows:

As an appreciation of the circumstances in which words are used usually is conducive and at times essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created—the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be obtained.¹⁴

Therefore, we must analyze the intent and purpose behind PLO 82

ordinarily all lands within the metes and bounds of the reservation perimeter (including lands underlying navigable waters) are intended to be included in the reservation. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

¹⁴ 248 U.S. 78 at 87.

¹³ The conclusion follows from the rule of construction for federal reservations that

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to see whether there was an intent to include coastal submerged lands in the withdrawal.

PLO 82 was an administrative action taken by Acting Secretary Fortas pursuant to the Presidential delegation of power contained in Executive Order 9146.¹⁵ Since PLO 82 was an administrative action, the contemporaneous intent of the Department of the Interior is the relevant inquiry. And being a 35-year-old administrative action, there is a fairly meager record from which to glean intent.

As its caption indicates ("Withdrawing Public Lands for Use in Connection with the Prosecution of the War"), PLO 82 was directly related to prosecution of World War II. See Exhibit B, attached, which is a Nov. 20, 1942 "Memorandum for the Secretary" from the General Land Office Commissioner. The memorandum states that exploration and development of an Alaskan oil and gas supply were needed for the war effort. As private industry had not developed an oil and gas field in Alaska under the Mineral

Leasing Act, the Federal Government was considering engaging in an oil and gas exploration program in an attempt to secure a source of oil for the armed forces. In order to protect the potential exploration area from interference by private claimants and lessees, it was considered necessary to withdraw the lands for exclusive federal use. Consequently, the lands were withdrawn from sale, location, selection and entry under the public land laws (including the mining laws), and from leasing under the mineral leasing laws.

The Nov. 20, 1942 memorandum from the Commissioner of the General Land Office to the Secretary explains PLO 82 this way:

The strategic position of Alaska with relation to the war effort has multiplied many fold the need for exploration for the purpose of locating and developing a supply of oil and gas within the territory. Notwithstanding the extremely favorable terms which are accorded to private oil operators under the oil and gas leasing act, both as originally approved in 1920 and as amended in 1935, there is no commercial oil or gas well in Alaska at this time. Furthermore, the possibility of any immediate operations in the area by private concerns is slight.

Consideration is being given to the possibility of exploration by the Government with a view to the possible discovery of a source of oil for the use of the armed forces. It is likely that any such exploration if it is undertaken, would be subject to interference on the part of numerous private claimants, lessees, etc., unless the land were first withdrawn from exploration by the public.

This withdrawal is proposed as an effective means of reserving the land to per-

¹⁵ Exec. Order 9146 transferred Presidential authority to withdraw or reserve the "public lands of the United States" to the Secretary. Presidential authority at that time sprang from, among others, the Pickett Act, June 25, 1910, 36 Stat. 847 (48 U.S.C. §§ 141, 142 (1970)) and implied executive powers. See Op. Atty. Gen. 73 (June 4, 1941). The bounds of delegated authority that existed at the time of PLO 82 brings us back to the meaning of "public lands," as discussed above. See also the discussion of the Secretary's authority under Exec. Order 9146 in *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 101, 116, concluding that the term "public lands" in Exec. Order 9146 could include submerged lands.

mit of the perfection of the necessary arrangements and of the completion of any exploration program that may be undertaken.

The November 1942 memorandum does not specifically address itself to the coastal submerged lands. It does, however, refer to the fact that 64 oil and gas leases covering some 137,000 acres existed in the area proposed to be withdrawn, as well as 105 oil and gas lease applications covering some 84,000 acres. We have been unable to determine whether any of these leases or lease applications included any submerged lands. The memorandum also refers to the "strategic position of Alaska" and the need to develop a supply of oil and gas "within the territory." The Territory of Alaska at that time, of course, included both inland and coastal submerged lands.

The Director of the Geological Survey, in a Nov. 16, 1942 memorandum (Exhibit C, copy attached), expressed doubt about the need for the northern Alaska withdrawal:

In response to your memorandum of November 13 to Mr. Deeds in which you propose a withdrawal from all forms of entry, but really, I understand, for the protection from exploitation of any contained oil, of three great tracts of public land in Alaska which you designate as Northern Alaska, Alaska Peninsula, and Katalla-Yakataga:

Your Northern Alaska proposal constitutes an enlargement of existing Naval Petroleum Reserve No. 4. Naval Reserve No. 4 as now described includes, with a wide margin of safety, the seepages at Cape Simpson, the chief and practically the only direct evidence of the existence of the oil in this remote area. The bound-

aries of Naval Reserve No. 4 include not only the lands that are most hopeful for exploration in this part of Alaska, but far more land than can conceivably be explored for oil, by drilling, during the present emergency. I see no present necessity for enlarging Naval Reserve No. 4 and, therefore, do not advise the withdrawal that you describe under the caption "Northern Alaska."

This point of view notwithstanding, Secretary Ickes decided to withdraw the three areas in question.¹⁶ If oil and gas were believed to exist in the inland and/or coastal submerged lands and if technology existed for its development, the administrative withdrawal of submerged lands would have been desirable in 1943.

In fact, the 1923 proclamation creating Naval Reserve No. 4 did include some submerged lands. The Order begins by noting the existence of "large seepages of petroleum *along the Arctic Coast of Alaska* and conditions favorable to the occurrence of valuable petroleum fields *on the Arctic Coast.*" (Italics added.) The Order included "all the public lands" not only along the coast to the highest highwater mark, but also within a line drawn along the

ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point where such barrier reefs are not over three miles off shore, except in the case of Plover Islands * * * where it shall be the highest highwater mark on the outer shore of these islands and the sandspits at either end. In cases where the barrier

¹⁶ See the handwritten note at the bottom of Exhibit C, which indicated the Secretary's decision.

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reef is over three miles off shore the boundary shall be the highest highwater mark of the coast of the mainlands.¹⁷

This order has remained in effect to the present day, and in fact Congress has enacted detailed instructions for managing this reserve, including transferring management of it to the Department of the Interior. See Naval Petroleum Reserves Production Act of 1976, Apr. 5, 1976, 90 Stat. 303, 42 U.S.C.A. § 6501 *et seq.* (West Supp. 1977). That the area withdrawn in 1923, including coastal submerged lands, remains in federal ownership is not and cannot be seriously disputed.

Nearly two decades before PLO 82 was signed, the Department had issued some prospecting permits under the Mineral Leasing Act for oil and gas which included submerged lands in the Arctic Ocean in the vicinity of Smith Bay.¹⁸ All of these permits had been cancelled or had expired by about 1932, 12 years before PLO 82. We have found no evidence that drilling occurred on any of these permits, but the fact that such permits had been issued could have raised concern that submerged lands in northern Alaska were subject to private exploitation and should be withdrawn. There is, however, no direct evidence that this possibility was

actually considered by the drafters of PLO 82.

The oil industry had begun a serious move into the marine environment before World War II. In fact, oil wells were drilled off the coast of California in 1896. As early as 1928 bayous, swamps, and bays in Texas and Louisiana were being drilled. From 1938 to 1942, twenty-five wells were drilled just beyond the coastlines of Louisiana and Texas. Following World War II oil exploration on the continental shelf was resumed with 53 wells drilled between 1945 and 1949.¹⁹ Offshore development during this early period always or nearly always followed development of the area immediately ashore. There was no onshore development in this area of northern Alaska at this time.

No contemporaneous assessment of the possibility of hydrocarbon production from the continental shelf north of Alaska has been uncovered. It might well have been regarded as too speculative to merit serious attention. The Arctic environment is not particularly hospitable to drilling in submerged lands principally because of ice floes and other problems related to the harsh climate. On the other hand, the waters overlying coastal submerged lands are quite shallow, often ranging in depth from 4 to 10 feet.

¹⁷ See Exec. Order No. 3797-A (Feb. 23, 1923).

¹⁸ These permits are on file in the BLM office in Anchorage.

¹⁹ "Petroleum's Bright Crescent," *The Humble Way*, 9-20 May-June 1949. This account notes the difficulty, cost, and uncertainty of the venture.

The Department had some reason to fear interference with a federal oil and gas exploration and development program. I have already discussed the 1937 Solicitor's Opinion holding that "public lands" could include coastal submerged lands. There was also a 1941 Opinion of the Attorney General which equated the words "public domain" in the Mineral Leasing Act to "public lands."²⁰ Moreover, as we have seen, the Department had issued prospecting permits for oil exploration in Smith Bay in Alaska in the 1920's, which included some submerged lands. These permits were issued under the Mineral Leasing Act, apparently on the theory that the Mineral Leasing Act extended to submerged lands, at least in territories. This position was not overruled until 1947, in an opinion dealing with coastal submerged lands adjoining states.

There is one other piece of evidence indicating that withdrawal of the submerged lands in Alaska from the operation of the public land laws would not have been meaningless. Congress extended the application of certain mining laws to Alaska in 1900, and provided that citizens or persons intending to become citizens "shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide * * * ." See Act of June 6, 1900, 31 Stat. 321, 329; see also 30 U.S.C. § 49a (1970). This legal authority to mine submerged lands might be regarded as an ex-

ample of the kind of threat to federal mineral management for the war effort that PLO 82 was designed to forestall, although I hasten to add there is no evidence that the drafters of PLO 82 considered it.

Finally, it might be observed that the drafters of PLO 82 need not have foreseen federal development efforts directly on or over the submerged lands in question in order to withdraw them. Rather, the purpose was to prevent private activity anywhere in the general area from interfering with proposed federal activity. (The Nov. 20, 1942 Memorandum for the Secretary, attached as Exhibit C, simply points out that any federal activity "would be subject to interference on the part of numerous private claimants, lessees, etc., unless the land were first withdrawn * * * .") Such private activity on or near inland submerged lands might well have posed complications to proposed federal activity on the submerged lands or on adjacent uplands. It would have been unwise to stop the withdrawal at the boundaries of inland waters. This is especially so since the inland submerged lands would have included those under non-navigable as well as navigable waters. There was no reason to distinguish between the two at the time, especially in light of PLO 82's purpose. Interference from activity on adjacent land might have been a little harder to foresee were coastal submerged land involved, but such interference could be imagined. Rights-of-way for transportation access, for ex-

²⁰ 40 Op. Atty. Gen. 9 (1941).

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ample, might have been required over lands admittedly covered by PLO 82 in order to get to coastal submerged lands.

Given the state of technology, I believe it was reasonable for the drafters of PLO 82 to perceive some threat of interference to drilling in the uplands, including in and around inland waters, but much less reason to perceive a threat of interference from private drilling in coastal submerged lands. To this extent, given the urgency of the war effort and the purpose of the 1943 withdrawal to protect federal petroleum exploitation, I believe it would have been reasonable for the drafters of PLO 82 to perceive some threat of interference to drilling in the beds of inland navigable waters, and therefore conclude that, to effectuate fully the important purpose of the Order, inland submerged lands were intended to be included. On the other hand, because offshore drilling technology was in relative infancy, untried and unproven in hostile environments such as the Arctic, and because the threat of interference from private activity was less, I believe it was less reasonable to assume the drafters intended to include coastal submerged lands.

D. Subsequent Modification of PLO 82.²¹

After it was issued, PLO 82 was modified several times, for purposes

unrelated to the current issue before it was revoked. With one exception, these subsequent modifications shed no light on whether PLO 82 included submerged lands. Where they mention the area withdrawn by PLO 82, they merely parrot the description set forth in PLO 82.

The one exception is PLO 1621, which modified PLO 82 to permit, in the area of "Northern Alaska" withdrawn by PLO 82, entries under the mining laws and issuance of mineral leases pursuant to the Mineral Leasing Act of 1920. PLO 1621 expressly disclaimed any effect on the "following-described lands" which were reserved by Executive Order in 1923 upon the creation of Naval Petroleum Reserve No. 4. As discussed earlier, these "following-described lands" included coastal submerged lands. (See pp. 166-167, *supra*.) Therefore, PLO 1621 reflects the Department's understanding in 1958 that PLO 82 included coastal submerged lands.

off the coast. See PLO 169, Sept. 21, 1943, 11 F.R. 8366. (Aug. 2, 1946). ("Northwesterly, with the 5 fathom line around Ocean Cape"). The PLO was issued on the authority of a statute providing for the creation of national forests, 16 U.S.C. § 473 (1970), was entitled "Withdrawing Public Lands for Use of the War Department for Military Purposes." Originally classified confidential, it was made public pursuant to a letter of the Secretary of War dated July 31, 1946. The jurisdiction it created expired in accordance with terms of the Order six months following termination of the unlimited national emergency then in effect. We have not found an explanation for this unusual withdrawal, but because it expressly included a coastal area, the failure to do so in PLO 82 could be seen as an intention not to withdraw such an area.

²¹ At least one nearly contemporaneous Public Land Order explicitly mentioned areas

PLO 82 was revoked on Dec. 6, 1960 by PLO 2215.²² The revocation order provides insight into the common understanding of PLO 82 inside the Department during this period. It not only revoked PLO 82, but also described and discussed the 1923 withdrawal of lands for Naval Petroleum Reserve No. 4. As we have seen earlier, NPR-4 included some submerged lands between the sandspits and islands forming the barrier reefs and the mainland. Before describing the boundaries of NPR-4, PLO 2215 makes the following statement:

"The following-described lands *lying within the exterior boundaries* of the area described in paragraph 1 [that is, the land withdrawn by PLO 82] are withdrawn by Executive Order No. 3797-A [creating NPR-4].²³

It seems plain that the drafters of PLO 2215 regarded PLO 82 as including submerged lands off the coastal mainland.²⁴

This inference is also supported by PLO 2214, issued the same day as PLO 2215. This Order formally created the Arctic National Wildlife Range, and it included sub-

merged lands off the mainland in much the same fashion as NPR-4. Specifically, the northern boundary of the range was described as follows:

Beginning at the intersection of the International Boundary line between Alaska and Yukon Territory, Canada, with the line of extreme low water of the Arctic Ocean * * * thence westerly *along the said line of extreme low water, including all offshore bars, reefs and islands* to a point of land on the Arctic seacoast known as Brownlow Point * * *²⁵

Thus, although both PLO 2214 and 2215 provide no help in ascertaining the Secretary's intent in 1943, and although both include only some submerged lands now at issue (those within the barrier islands), they do—along with the maps prepared and published by the Department in July 1958 (see p. 162, *supra*)—indicate the understanding of the extent of PLO 82 at the time it was repealed.

III. THE IMPACT OF THE SUBMERGED LANDS ACT AND THE ALASKA STATEHOOD ACT

PLO 82 preceded by ten years the passage of the Submerged Lands Act, May 22, 1953, 67 Stat. 29, 43 U.S.C. § 1301 *et seq.*, (1970), which, among other things, granted to states then existing the submerged lands lying off their coasts. Sec. 6(m) of the Alaska Statehood Act of 1958, 48 U.S.C. Prec. § 21, made this provision applicable to Alaska:

²⁵ 25 FR 12598 (Dec. 9, 1960). (Italics added.)

²² Except for certain lands of the Arctic Wildlife Refuge and for Naval Petroleum Reserve No. 4, PLO 2215 opened the lands to settlement and to (a) filing of applications, selection and location allowable on unsurveyed lands under the nonmineral public land laws, the homestead and Alaska homestead laws; and (b) selection by the state under the Alaska Statehood Act. It also validated certain preference right claims.

²³ 25 FR 12599 (Dec. 9, 1960). (Italics added.)

²⁴ PLO 2215 stated that the area withdrawn by PLO 82 "contains approximately 48,000,000 acres." This is 800,000 acres less than the estimate contained in PLO 82. There is no indication of the derivation of this estimate.

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The Submerged Lands Act of 1953 shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

Except for sec. 5(a) of the Submerged Lands Act, the coastal submerged lands or those underlying inland navigable waters would unquestionably have passed to the State upon its admission to the Union. However, sec. 5(a) (43 U.S.C. § 1313(a) (1970)), excepts from the grant to States

all lands expressly retained by * * * the United States when the State entered the Union (otherwise than by a general retention * * * of lands underlying the marginal sea) * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right.

If either of these exceptions to the broad statutory grant applies, the Submerged Lands Act is prevented from operating through the Statehood Act to relinquish the submerged lands to Alaska.

The first exception in the Submerged Lands Act refers to lands expressly retained by the United States when the State entered the Union other than by a general retention of lands underlying the marginal sea. The issue is whether PLO 82 qualifies as *expressly retaining* the submerged lands for the United States when Alaska entered the Union in 1958.

The legislative history of this section of the Submerged Lands Act shows that Congress' intent was to

prevent the federal executive from arguing that lands have been retained merely by operation of the doctrine that the United States had paramount title to the land. For example, the debate on the Senate floor made clear that this provision allowed the Federal Government to reserve "areas * * * used by the government in its governmental capacity for one or more of its governmental purposes."²⁶ Following this reasoning, any formal withdrawal like PLO 82 for a plain governmental purpose would qualify as an "express retention."

The courts have so interpreted sec. 5(a). In the 1970 case of *United States v. State of Alaska*, discussed above, the Court of Appeals held that the land underlying Lake Tustumena did not pass to the State of Alaska upon statehood because of this section. The court noted that the

language of the Order is sufficiently clear to withdraw the water of the lake and the submerged land, [and therefore] the state's rights, if any, are subsequent in time and inferior in right to those of the appellant.

423 F.2d at 768.

The court deemed the language "all of the hereinafter-described areas of land and water" an express retention of those lands underlying Lake Tustumena.

The *State of Alaska* case teaches that, in order to qualify as "ex-

²⁶ 99 Cong. Rec. 2819 (1953) (Remarks of Sen. Cordon).

pressly retained" under sec. 1313 of the Submerged Lands Act, the submerged land need not be specifically described in the withdrawal order.²⁷ PLO 82 withdrew "all the public lands * * * within the following described areas," including "all that part of Alaska lying north of a [specific] line." This description is as precise as that held to be an express retention in the *State of Alaska* case. This, plus the analysis in Section II of this opinion, leads me to conclude that PLO 82 expressly retained the lands it withdrew for the United States. The fact that PLO 82 was issued for a particular purpose—protection of those lands from private exploitation—adds force to the argument that they were not merely "generally retained." See also *United States v. City of Anchorage, State of Alaska*, 437 F.2d 1081 (9th Cir. 1971).

I therefore conclude that the "expressly retained" exception in sec. 5(a) of the Submerged Lands Act would have prevented title to the submerged lands withdrawn by PLO 82 from passing to the State upon statehood.

On the other hand, because I determine herein that the coastal submerged lands were not withdrawn by PLO 82, I must consider the

second exception in sec. 5(a); viz. whether the United States has "any rights * * * in lands presently and actually occupied by the United States under claim of right." Except for the Arctic National Wildlife Range, discussed below at pages 175-177, there is scant evidence that the United States actually occupied these coastal submerged lands at statehood. The Supreme Court has also recently indicated that this exception should be narrowly construed. See *United States v. California*, 436 U.S. 32 (1978). Therefore, I hold that the second exception does not apply.²⁸

IV. RULES OF CONSTRUCTION OF FEDERAL GRANTS

I have considered, in reaching my conclusions herein, the applicable rules of construction for orders such as PLO 82. One well-established principle is that grants by the Federal Government "must be construed favorably to the government and * * * nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the government."²⁹ This doctrine ap-

²⁷ The Joint Resolution on sec. 5 of the Submerged Lands Act shows that the term "specifically described" as modifying "tracts or parcels of land" was included in an earlier draft but later deleted. The explanation of the deletion was that it was for "perfecting" purposes. 1953 U.S. Code and Admin. News, 1490, 1496. This indicates an intent to make the phrase symmetrical with later references in the section to "lands."

²⁸ A respectable argument might be made that the coastal submerged lands in the Arctic National Wildlife Range are protected in federal ownership as a result of this "claim of right" exception. Because I conclude below that these lands were expressly retained at statehood, (see pp. 175-177), there is no need to consider this argument further at this time.

²⁹ *Caldwell v. United States*, 250 U.S. 14 (1919); *Shively v. Bowlby*, 152 U.S. 1, 10 (1894); *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942).

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plies to grants to states as well as grants to private parties.³⁰ This means that section 5(a) of the Submerged Lands Act must be read to resolve ambiguities in favor of the Federal Government, which in turn means that PLO 82 prevented transfer of title, to the State of Alaska upon statehood, of the submerged lands that I have determined it withdrew.

There are cases holding that lands under navigable waters in territories are held by the Federal Government for the ultimate benefit of future states, and are not disposed of by the United States "save in exceptional circumstances when impelled to particular disposals by some international duty or public exigency." See *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926); *Shively v. Bowlby*, 152 U.S. 1, 49, 57-58 (1894). Therefore, disposals by the United States are "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. at 55.

There are several reasons why these cases might not be apposite here. First, there is arguably no "disposal" of the public land here, to the derogation of the future state's possible ownership.³¹ In-

stead, the only question is whether these submerged lands were reserved to the United States rather than disposed of to third parties. In fact, insofar as PLO 82 sought to prevent private mineral developers from accruing rights on the lands reserved, it furthered the interests of the future State of Alaska by protecting the land ultimately for selection by the State upon statehood.

Second, and more important, I believe that a definite intention can be found in PLO 82 to reserve the inland (but not the coastal) submerged lands, as one was found in another Alaska withdrawal creating the Kenai Moose Range, *United States v. State of Alaska*, 423 F.2d 764, 767 (9th Cir. 1970).

Finally, *Holt State Bank* and *Shively v. Bowlby* both refer to the right and responsibility of the United States to dispose of the public lands in a territory to meet some "international duty or public exigency." PLO 82's direct relationship to the prosecution of World

which convey or lead to the conveyance of title by the United States—such as grants or allotments—was upheld by the Supreme Court in *Udall v. Tallman*, 380 U.S. 1, 19-23 (1965). That holding admittedly did not concern a reservation of public lands from conveyance to a state, but rather withdrawing lands from mineral leasing; nevertheless, it sheds some light on the term "disposition." Although the *Holt State Bank* case, *supra*, appears to treat an alleged reservation of submerged lands to fulfill a treaty obligation with an Indian Tribe as a "disposal," see 270 U.S. at 55, 58, that case ultimately turned on the Court's holding that the submerged lands were not intended to be reserved.

³⁰ *Dubuque and Pacific R.R. Co. v. Litchfield*, 64 U.S. (23 How.) 66 (1859).

³¹ The Secretary's construction of a public land "disposition" as relating to those acts

War II—a “public exigency” beyond challenge—allows ample room for arguing that, even if PLO 82 is a “disposal” of public lands, it is sufficiently plain to fall within the exception these cases recognize. See *United States v. City of Anchorage*, 437 F. 2d 1081, 1085 (9th Cir. 1971), where the Court of Appeals described the establishment of the Alaska Railroad as one of those “exceptional instances” which fell within the exception to the general rule of *Holt State Bank* and *Shively*, and found submerged lands were withdrawn even though there was no express reservation. As the Supreme Court said most recently in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 634 (1970):

[N]othing in the *Holt State Bank* case or in the policy underlying its rule of construction * * * requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor.

And further:

[I]t seems well settled that the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands. * * * [T]he question is whether the United States intended [to do so].³³

V. THE EFFECT OF REVOCATION OF PLO 82 IN 1960

The final question is whether the State automatically gained title to the lands upon revocation of PLO 82 in 1960, one year after statehood.

The short and complete answer to this contention is that it is foreclosed by the express language of

section 5(a) of the Submerged Lands Act, which exempts from transfer “[a]ll lands expressly retained by * * * the United States when the State entered the Union * * *.” 43 U.S.C. § 1313(a) (1970). (Italics added.) The exception operates at a fixed point in time; namely, upon statehood. The inclusion of this clause implies that if this exception is applicable at the time of statehood, it constitutes a permanent retention by the United States of those submerged lands. Thus, the subsequent revocation of PLO 82 did not divest the United States of title to the submerged lands withdrawn by PLO 82. The revocation of PLO 82 might allow the State of Alaska to select these submerged lands as part of their entitlement under the Statehood Act, subject to federal approval as required by that Act.³⁴ But mere revocation of the Order could not have automatically transferred title to the State.³⁴

VI. CONCLUSION

For the reasons set forth above, I conclude that PLO 82 expressly reserved the submerged lands un-

³³ See note 4, *supra*. The Statehood Act authorizes the State to select certain kinds of “public lands.” Whether the phrase “public lands” in this context includes submerged land requires an inquiry similar to that set forth in Part II.A above, and I have not conducted such an inquiry in preparing this opinion.

³⁴ This conclusion is reinforced by section 4 of the Alaska Statehood Act, which provides that the State “forever disclaim[s] all right and title to any lands * * * not granted or confirmed to the State * * * by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States * * *.” 48 U.S.C. Note Preceding § 21.

³³ 397 U.S. at 633.

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derlying inland navigable waters within the area it withdrew in northern Alaska, and that therefore such lands did not pass to the State of Alaska under the Alaska Statehood Act, by operation of the Submerged Lands Act, and did not pass to the State upon revocation of PLO 82. I also find, however, that PLO 82 stopped at the ocean's edge, and did not withdraw the coastal submerged lands. Therefore title to these lands passed to the State upon statehood.

Finally, as noted earlier, the face of PLO 82 itself suggests, on balance, that the withdrawal extends to the actual coastline. If, as I believe, the better argument is that the withdrawal stopped at the water's edge, there is nothing to suggest that the drafters intended it to extend to the legal or constructive as opposed to the actual, physical coastline. Therefore, I believe the intent is best served if we interpret PLO 82 as withdrawing only to the actual coastline.

VII. EFFECT OF CONCLUSION ON BOUNDARY OF ARCTIC NATIONAL WILDLIFE RANGE

Because I have concluded that PLO 82 did not reserve the coastal submerged lands, there was no formal, completed withdrawal which reserved the coastal submerged lands in the Arctic National Wildlife Range area prior to Alaskan statehood in 1959. The

land ultimately included in the Range had, however, been described in an application for a withdrawal filed by the Fish and Wildlife Service in January 1958, one year before statehood. *See* 23 FR 364.

Under the regulations then in existence, 43 CFR 295.11(a) (1959 Supplement), the application operated by itself to segregate the land from all forms of disposal under the public land laws, to the extent that the withdrawal applied for would, if finally executed, prevent such forms of disposal. This segregative effect remained until final action was taken on the application. This fact was noted and given added momentum in PLO 1621 signed Apr. 18, 1958, eight months before statehood. *See* p. 169 *supra*.

Because ultimate placement of these lands in the Wildlife Range prevented their disposition to the State, it is obvious that the segregative effect of the withdrawal application was, under the regulations in effect at that time, effective against passage of title of submerged lands to the State upon statehood.

The only fact that could lead to doubts about this conclusion is a brief opinion signed by the Deputy Solicitor in 1959 regarding the effect of a pre-statehood application for a withdrawal of coastal submerged lands for a proposed Aleutian Islands National Wildlife Refuge upon passage of title to the State. *See* M-36562 (Aug. 21, 1959). This opinion concludes that the segregation of the coastal submerged

lands by the withdrawal application is not sufficient to prevent title from passing to the State at statehood by operation of the Submerged Lands Act made applicable to Alaska by the Statehood Act.

Unfortunately, this opinion contains almost no reasoning to support its conclusion. Most particularly, it does not even consider the effect of sec. 5(a) of the Submerged Lands Act, excepting from transfer to the State those lands expressly retained by the United States, or "presently and actually occupied by the United States under claim of right." The core issue that the opinion should have addressed, but instead ignored, was whether a segregation (by application) qualified under sec. 5(a) to prevent passage of title at statehood.

As I have discussed earlier, it is plain that a completed withdrawal of lands qualifies as an express retention under the Submerged Lands Act. The Departmental regulations in effect at that time gave an identical effect to an application—it segregated the lands from disposal to the same extent that the withdrawal applied for would, if finally executed, have done. The purpose of the regulation is clear: The filing of an application prevented anything from happening, prior to a decision on the application, which would have rendered a favorable decision on the application impossible. Now the Secretary might well have decided in his discretion to reject a previously-filed application because of statehood, and instead let the State select the submerged lands included in the application. But to allow statehood by itself to

override the segregative effect of withdrawal applications provided for in the regulations substantially vitiates the meaning of the "expressly retained" proviso in the Submerged Lands Act.³⁵ That being the case, I have no difficulty in overruling the Deputy Solicitor's opinion and finding that the pre-statehood application for a withdrawal operated as an express retention of the lands at statehood under the Submerged Lands Act, and prevented passage of title of the coastal submerged lands to the State.

Therefore, my opinion that PLO 82 did not withdraw the coastal submerged lands in northern Alaska (including those coastal submerged lands ultimately included in the Arctic National Wildlife Range) does not mean that the coastal submerged lands in the Range passed to the State at statehood. Instead, the 1958 application by the Bureau of Sport Fisheries and Wildlife and the management of those lands for

³⁵ It also substantially vitiates the meaning of § 6(e) of the Statehood Act, which excepts from transfer to the State "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife * * * ." (Italics added.) This proviso was very briefly considered by the Deputy Solicitor in his 1959 opinion. In the last sentence of that opinion, he observed that he could "find nothing" in that proviso to support a conclusion that the withdrawal application prevented passage of title to the State. This ignored the plain implication of the underlined language in § 6(e); i.e., lands may not only be *withdrawn* for wildlife protection but also "otherwise set apart" for such purposes. Although the mere filing of the application did not create a formal "refuge" within the language of sec. 6(e), the application for a withdrawal for such purposes under then-existing regulations operated in fact to set the lands in the application apart and reserve them for possible use for the protection of wildlife until the application could be ruled on.

December 12, 1978

wildlife purposes operated to retain the lands in federal ownership, where they remain.

LEO KRULITZ,
Solicitor.

EXHIBIT A [PUBLIC LAND ORDER 82]

ALASKA

WITHDRAWING PUBLIC LANDS FOR USE IN CON- NECTION WITH THE PROS- ECUTION OF THE WAR

By virtue of the authority vested in the President and pursuant to Executive Order No. 9146 of April 24, 1942, *It is ordered as follows:*

Subject to valid existing rights, (1) all public lands, including all public lands in the Chugach National Forest, within the following-described areas are hereby withdrawn from sale, location, selection, and entry under the public-land laws of the United States, including the mining laws, and from leasing under the mineral-leasing laws, and (2) the minerals in such lands are hereby reserved under the jurisdiction of the Secretary of the Interior, for use in connection with the prosecution of the war:

NORTHERN ALASKA

All that part of Alaska lying north of a line beginning at a point on the boundary between the United States and Canada, on the divide

between the north and south forks of Firth River, approximate latitude $68^{\circ}52'$ N., longitude $141^{\circ}00'$ W., thence westerly, along this divide, and the periphery of the watershed northward to the Arctic Ocean, along the crest of portions of the Brooks Range and the De Long Mountains, to Cape Lisburne.

The area described, including both public and non-public lands, aggregates 48,800,000 acres.

ALASKA PENINSULA

Beginning at the highest point on Mt. Veniaminof, approximate latitude $56^{\circ}13'$ N., longitude $159^{\circ}24'$ W.;

South, approximately 24 miles, to a point on the north shore of Ivanof Bay;

Northeasterly, approximately 400 miles, along the Pacific Ocean, Shelikof Strait and Cook Inlet to Tuxedni Bay;

Northwesterly, approximately 46 miles, along the south shore of Tuxedni Bay, to the headwaters of the principal stream entering Tuxedni Bay from the west, across the Aleutian Range of mountains to the most northerly point of Little Lake Clark;

Southwesterly, approximately 340 miles, along the easterly shores of Little Lake Clark, Lake Clark and Sixmile Lake to Newhalen River, downstream along the left bank of Newhalen River to Iliamna Lake, southwesterly along the north

and west shores of Iliamna Lake to Kvichak River, downstream along the left bank of Kvichak River, and the shores of Kvichak Bay and Bristol Bay, to a point due north of the point of beginning;

South approximately 22 miles, to the point of beginning.

The area described, including both public and non-public lands, aggregates 15,600,000 acres.

KATALLA-YAKATAGA

Beginning at Cottonwood Point, at the mouth of Copper River, approximate latitude 60°17' N., longitude 144°55' W.;

Northerly, approximately 18 miles upstream along the left bank of Copper River to a point on the North boundary of the Chugach National Forest;

Easterly, approximately 32 miles, along the north boundary of the Chugach National Forest to the east boundary of the national forest;

East, approximately 100 miles, to the boundary between the United States and Canada;

South, approximately 16 miles, along the International Boundary to Mt. St. Elias;

South, approximately 38 miles, across Malaspina Glacier, to the Gulf of Alaska;

Westerly, approximately 140 miles, along the Gulf of Alaska, to the point of beginning.

The area described, including both public and non-public lands, aggregates 3,040,000 acres.

The total area described in the three tracts aggregates approximately 67,440,000 acres.

This order shall not affect, or modify existing reservations of any of the lands involved except to the extent necessary to prevent the sale, location, selection, or entry of the above-described lands under the public-land laws, including the mining laws, and the leasing of the lands under the mineral-leasing laws.

ABE FORTAS,

Acting Secretary of the Interior.

JANUARY 22, 1943.

[F.R. Doc. 43-1796; Filed, February 3, 1943; 9:45 a.m.]

[8 FR p. 1599, 2/4/43]

EXHIBIT B

DEPARTMENT OF THE INTERIOR GENERAL LAND OFFICE WASHINGTON

Nov. 20, 1942.

MEMORANDUM for the Secretary.

The attached draft of a public land order would withdraw, subject to valid existing rights, the described lands from sale, location, selection or entry under the public land laws including the mining laws, and from leasing under the mineral leasing laws, and reserve the minerals in the lands for use in connection with the prosecution of the war. There are also attached a letter to the Attorney General, and a letter to the Director, Bureau of the Budget.

THE EFFECT OF PUBLIC LAND ORDER 82 ON THE
OWNERSHIP OF COASTAL SUBMERGED LANDS
IN NORTHERN ALASKA

December 12, 1978

There are in the areas described in the proposed order approximately 360 patented entries embracing about 3,000 acres, 64 oil and gas leases embracing approximately 137,006 acres, and about 105 oil and gas lease applications embracing approximately 84,000 acres. If and when this order is signed the lease applications will be rejected.

The strategic position of Alaska with relation to the war effort has multiplied many fold the need for exploration for the purpose of locating and developing a supply of oil and gas within the territory. Notwithstanding the extremely favorable terms which are accorded to private oil operators under the oil and gas leasing act, both as originally approved in 1920 and as amended in 1935, there is no commercial oil or gas well in Alaska at this time. Furthermore, the possibility of any immediate operations in the area by private concerns is slight.

Consideration is being given to the possibility of exploration by the Government with a view to the possible discovery of a source of oil for the use of the armed forces. It is likely that any such exploration if it is undertaken, would be subject to interference on the part of numerous private claimants, lessees, etc., unless the land were first withdrawn from exploration by the public.

This withdrawal is proposed as an effective means of reserving the land to permit of the perfection of the necessary arrangements and of the completion of any exploration program that may be undertaken.

It is recommended that you sign the attached letters to the Attorney General and the Director, Bureau of the Budget.

FRED W. JOHNSON,
Commissioner.

EXHIBIT C

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WASHINGTON

Nov. 16, 1942.

MEMORANDUM for Mr. Havell:

In response to your memorandum of November 13 to Mr. Deeds in which you propose a withdrawal from all forms of entry, but really, I understand, for the protection from exploitation of any contained oil, of three great tracts of public land in Alaska which you designate as Northern Alaska, Alaska Peninsula, and Katalla-Yakataga:

Your Northern Alaskan proposal constitutes an enlargement of existing Naval Petroleum Reserve No. 4. Naval Reserve No. 4 as now described includes, with a wide margin of safety, the seepages at Cape Simpson,

the chief and practically the only direct evidence of the existence of oil in this remote area. The boundaries of Naval Reserve No. 4 include not only the lands that are most hopeful for exploration in this part of Alaska, but far more land than can conceivably be explored for oil, by drilling, during the present emergency. I see no present necessity for enlarging Naval Reserve No. 4 and, therefore, do not advise the withdrawal that you describe under the caption "Northern Alaska."

Your proposed Alaska Peninsula withdrawal covers the known favorable structures in that part of the Territory with their accompanying seepages, together with the areas that have been drilled. While the proposed withdrawal is abundantly generous, the difficulties of segregating by detailed description the areas within it that contain potentialities, are recognized. If a withdrawal is deemed advisable, despite the fact that the Secretary now has the power to reject all applications for oil rights under the oil land leasing act, then this is an area in which such action is justified.

For similar reasons your proposed withdrawal of the Katalla-Yakataga area is not objected to, even though it includes a vast terrain that is covered with glaciers and intensely folded mountain regions that are impossible from the point of view of oil content or recovery.

The justification of the withdrawal of the Alaska Peninsula area, in so far as it rests upon the possibility of oil content in the land is that the southeastern border of that area contains definitely recognized and mapped structures which, so far as such features alone are concerned, are favorable to the trapping of any oil present. The structural evidence is fortified in a measure by known oil seepages and the revelation in some shallow wells that have been drilled of minor and thus far non-commercial quantities of oil.

The justification for the Katalla-Yakataga withdrawal lies in the fact that in the Katalla area a small yield of high-grade oil was obtained for a number of years from a group of shallow wells. No oil is now produced in this area but additional oil probably can be produced in small quantities. The Yakataga portion of the area contains untested, apparently favorable structures. Testing by drilling appears to be justified.

Consideration of course will be given in your office to the effect of any proposed withdrawals upon existing Forest Reserves, Military or Naval reservations, Fish and Wildlife protection, and similar matters of which the Survey has no especial cognizance.

W. C. MENDENHALL,
Director.

11-18-42.

NOTE: I discussed with Secretary Ickes and he instructed that we proceed with the withdrawal of the three (3) areas.

[This note was handwritten]

WOLFSOHN.

181] TAX STATUS OF THE PRODUCTION OF OIL AND GAS FROM 181
JICARILLA APACHE TRIBAL LANDS UNDER THE 1938
INDIAN MINERAL LEASING ACT

March 2, 1979

**TAX STATUS OF THE PRODUCTION
OF OIL AND GAS FROM JICARILLA
APACHE TRIBAL LANDS UNDER
THE 1938 INDIAN MINERAL LEAS-
ING ACT**

M-36896 (Supp.)

March 2, 1979

**Indian Lands: Leases and Permits: Oil
and Gas**

Tribal royalties from leases of Jicarilla Apache tribal lands cannot be taxed by the State of New Mexico.

Indian Lands: Taxation

The taxation proviso contained in 25 U.S.C. § 398c (1970) does not apply to leases entered into under the 1938 Leasing Act (25 U.S.C. §§ 396a-396f (1970)). States cannot tax tribal royalties from such leases.

Mineral Leasing Act: Generally

Oil and gas leases of Indian lands entered into under the 1938 Mineral Leasing Act (25 U.S.C. §§ 396a-396f (1970)) are not subject to the taxation proviso contained in 25 U.S.C. § 398c (1970).

**OPINION BY OFFICE OF THE
SOLICITOR**

February 2, 1979

TO: ASSISTANT SECRETARY—INDIAN
AFFAIRS

FROM: SOLICITOR

SUBJECT: TAX STATUS OF THE PRO-
DUCTION OF OIL AND GAS FROM
JICARILLA APACHE TRIBAL LANDS.

I advised you by a Nov. 7, 1977, opinion (M-36896, 84 I.D. 905 (1977)), that tribal royalties from production of oil and gas on Fort

Peck tribal lands under leases made pursuant to the 1938 Indian Mineral Leasing Act, 52 Stat. 347, 25 U.S.C. §§ 396a-396f (1970), are not taxable by the State of Montana. You have now requested my opinion as to whether a like conclusion is applicable to tribal royalties from leases of Jicarilla Apache tribal lands, with respect to taxation by the State of New Mexico.

The State of Montana asserted authority to levy taxes on production from the Fort Peck lands under purported sanction of 25 U.S.C. § 398 (1970) (Act of May 29, 1924, 43 Stat. 244), which had authorized taxation of production from tribal lands leased under 25 U.S.C. § 397 (1970) (Act of Feb. 28, 1891, 26 Stat. 795), that is, "bought and paid for" tribal lands. I concluded that the 1938 Leasing Act, which contained a comprehensive mineral leasing scheme but which did not contain a provision authorizing state taxation of production, did not incorporate the express taxing provision in the 1924 Act (25 U.S.C. § 398), and that therefore § 398 did not authorize taxation of royalties from production under leases made pursuant to the 1938 Act. I also noted in that opinion that there is no other statute which might grant authority for state taxation of Indian royalties from such leases.

The Jicarilla Apache Reservation is distinguishable from Fort Peck in that it is an Executive Order reservation, and New Mexico taxes production of oil and gas thereon

under purported authority of 25 U.S.C. § 398c. That section, worded similarly to the taxing proviso in § 398, was part of the Act of Mar. 3, 1927, 44 Stat. 1347, 25 U.S.C. §§ 398a-398e, which authorized mineral leasing on Executive Order reservations. Both that Act and its legislative history made clear that Congress intended the leasing authority for tribal lands on Executive Order reservations and the policy of permitting the states to tax production thereon to be the same as that applicable to "bought and paid for" reservations.¹

As discussed in the Nov. 1977, opinion, the 1938 Act replaced the earlier fractionated leasing authorities (including §§ 398a-398e) with a comprehensive and uniform scheme for all reservations, with a few specific exceptions.² Sec. 398c cannot be distinguished from § 398 in this regard. Both were enacted prior to the 1938 Act, and the effect of the 1938 Act was the same on both. Thus, if the taxing proviso in § 398 was not incorporated into the 1938 Act, as I earlier concluded, neither was the taxing proviso in § 398c. Accordingly, it is my conclusion that taxation of production on Jicarilla Apache tribal lands from leases made under the 1938 Leasing Act is not authorized by § 398c. Absent specific statutory permission, New Mexico lacks authority to tax Indian property. (Solicitor's Opinion, M-36896 at 84 I.D. 10 (1977)) Thus, New Mexico may not tax royalties received by the Jicarilla Apache Tribe from 1938 Act leases.

LEO KRULITZ,
Solicitor.

WIELSONS, INC.

IBCA-1126-9-76

Decided March 8, 1979

Contract No. N00 C 1420 6159, Bureau of Indian Affairs.

Sustained.

1. Contracts: Formation and Validity: Bid Award

Where the contractor's bid is accepted during an extension of the bid acceptance period conditioned upon the contractor not being prejudiced by changes resulting from energy related shortages, the Board finds that the contractor's conditional acceptance of a change order increasing prices for asphaltic materials to a certain date continued the bid qualification in effect and does not preclude recovery of asphaltic price increases thereafter.

2. Contracts: Construction and Operations: Actions of the Parties—Contracts: Performance or Default: Release and Settlement

Where the Government has accepted a bid conditioned upon the contractor not being prejudiced by changes resulting from energy related shortages and the parties agree in a change order to an increase in price for asphaltic materials, the Board finds the agreement does not constitute an accord and satisfaction precluding further price increases where the evidence shows there was no meeting

¹ See, e.g., S. Rep. 1240, 69th Cong. 2nd Sess. (1927); S. Rep. 768, 69th Cong., 1st Sess. (1926).

² The specific exceptions are named in § 6 of the 1938 Act, 25 U.S.C. § 396f.

March 8, 1979

of the minds and this was evident to the contracting officer prior to execution of the change order.

APPEARANCES: Mr. Douglas M. Carnival, Attorney at Law, O'Connor & Hannan, Washington, D.C., for appellant; Mr. William Back, Department Counsel, Window Rock, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

*INTERIOR BOARD OF
CONTRACT APPEALS*

Appellant seeks to recover additional costs of \$80,558.41 (plus interest) attributable to successive price increases in asphaltic materials during performance of a road construction contract. The contract was awarded after appellant had conditioned an extension of the bid acceptance period "on the basis it does not prejudice any action required by us in the event of unreasonable delay, description or change occurring in the work as a direct or indirect result of energy shortages and/or energy related material shortages."¹ By agreement of the parties during the hearing held on July 31, 1978, only the issue of entitlement is presented in this appeal (Tr. 91).

BACKGROUND

Appellant was the apparent low bidder on a project for the building

of approximately 15½ miles of roadway between Whitehorse and Pueblo Pintado, New Mexico. The bid was opened by the Bureau of Indian Affairs (BIA) on Nov. 14, 1973. By its terms the bid was subject to acceptance within 60 days after opening. In an exchange of letters dated Jan. 11, 1974, the BIA requested and appellant granted a 30-day extension of the bid acceptance period with the above-quoted qualification. The BIA accepted appellant's bid under the qualified extension on Feb. 8, 1974, awarding a contract for \$3,132,074.76.

By reason of a stipulation between the parties accepted by the Board as Board Exhibit 1, the parties do not dispute the following facts and sequence of events.

The contract required the use of large volumes of emulsified asphalt, grade CSS-1h under Item 312(2) and asphalt cement, 120-150 penetration under Item 403(2). Appellant placed a purchase order on Feb. 8, 1974, with Chevron.² Chevron rejected the purchase order on Mar. 23, 1974, advising that the quoted prices could not be honored because of the long delay between the quote and award, and that the prices that would apply to asphaltic materials would be those in effect at the time of delivery. Appellant notified the BIA of this resulting uncertainty of asphaltic material prices on Mar. 29, 1974. The changes in price of these materials per ton during the contract

¹ AF-A. All references herein will use the following abbreviations: appeal file=AF, transcript=Tr., appellant's exhibit=AX, and Government exhibit=GX.

² AF-O.

performance period is shown below:

Date	Item 312(2) emulsified asphalt	Item 403(2) asphalt cement
Nov. 14, 1973----	52. 18	57. 88
Mar. 23, 1974----	63. 00	63. 00
Sept. 13, 1974----	68. 00	68. 00
Jan. 30, 1975----	73. 00	73. 00
Mar. 21, 1975----	82. 02	82. 02
June 18, 1975----	84. 02	84. 02

At the request of appellant, representatives of the BIA, appellant and Chevron met on Aug. 2, 1974, to discuss the price increases of asphaltic materials. Subsequently on Aug. 6, 1974, the BIA issued Change Order No. 2 increasing the unit prices of Items 312(2) and 403(2) to reflect the increased cost of asphaltic materials. The total contract price was increased by \$189,000.30. By letter dated Aug. 7, 1974, appellant accepted Change Order No. 2 "with the condition that should the costs of the bituminous materials increase over the current prices due to scarcity, fluctuating market and/or the national energy crisis we have the right to claim reimbursement for the additional cost involved to purchase these bituminous materials."³

By letter dated Sept. 23, 1974, appellant advised the BIA of an additional increase by Chevron (on Sept. 13, 1974) in prices of asphaltic materials and requested another

meeting to be scheduled.⁴ The BIA responded by letter of Oct. 2, 1974, to appellant's letters of Aug. 7 and Sept. 23, 1974. The response advised that the contract contained no provision to pay increased costs for the stated reasons and that if appellant intended to file a claim, it should be done when the project is completed.

Thereafter, as the prices of asphaltic materials used on the project were increased, appellant notified BIA. On Aug. 25, 1975, after completion of the road project, appellant made a formal claim for an additional payment of \$45,917.54 for such increases.⁵ The claim was rejected by the contracting officer by letter dated Aug. 16, 1976.⁶ Appellant timely appealed the adverse decision on Sept. 13, 1976. The amount of the claim was increased to \$80,558.41 at the hearing by amendment of the complaint.⁷

Discussion and Findings

The Government contends (1) that the extension of the bid acceptance period did not cause appellant to lose its asphalt supply commitment because Chevron's quote expired in 15 days rather than 60

⁴ AF-E.

⁵ AF-K.

⁶ AF-E.

⁷ Quantum was not presented at the hearing; however, Rule 4.108 permits the Board to allow either party to amend pleadings on conditions just to both parties. Noting that the appellant's release of claims did not reserve a specific amount, the amendment is allowed as nonprejudicial to the Government. Appellant must still present convincing proof of the actual price increase involved to the contracting officer.

³ AF-D.

March 8, 1979

days; (2) that Change Order No. 2 constitutes an accord and satisfaction as to appellant's entitlement to reimbursement for delay in awarding the contract; and (3) that the Government is not bound by declarations of its representatives at the Aug. 2, 1974, meeting because the representatives lacked authority to bind the Government.

Appellant contends that the condition attached to the extension of the bid acceptance period was a continuing one covering the entire performance period and that Change Order No. 2 was intended only to recognize cost increases up to Aug. 2, 1974, without limiting appellant's right to additional reimbursement if prices for asphaltic materials continued to rise.

The Government's first argument rests on evidence presented that the Chevron quotation on which appellant bid was based was verbal, and that a Mar. 1, 1974, letter from Chevron to appellant indicated a 15-day acceptance period on telephonic quotes.⁸ The only documentary evidence supporting a 60-day acceptance period on Chevron quotations is a letter dated July 5, 1977, from the area sales manager of Chevron.⁹ The Government challenges the value of this evidence which was discovered just prior to the hearing, and contends the contemporaneous evidence shows that appellant was not confronted with a change increasing his cost or time of performance because the Chev-

ron quotation had expired 45 days before the end of appellant's bid acceptance period. The inference is that had the Government accepted appellant's bid prior to the end of the 60-day acceptance period, appellant would have been in the same position respecting an uncommitted source of asphaltic materials as he, in fact, was when appellant's bid was accepted during the qualified bid extension period.

The obvious conflict in the evidence over the length of time the Chevron quotation remained open for appellant's acceptance need not be resolved. The Government was not in a position to award the contract to appellant until after both appellant's and Chevron's (whether 15 or 60 days) acceptance periods would lapse.¹⁰ Therefore, we are not concerned with determining the rights and obligations of the parties in the circumstances of an award having been made during the original bid acceptance period. It may be that a timely acceptance of appellant's bid would have resulted in Chevron's refusal to honor its quotation beyond 15 days. However, upon requesting and accepting appellant's qualified extension of the acceptance period, the Government assumed a new obligation toward appellant regarding liability for the then existing uncertainties regarding the prices for asphaltic materials.

¹⁰ AF-A, the BIA letter dated Jan. 11, 1974, requesting a 30-day extension of appellant's bid advises that National Park Service clearance to use the Pueblo Pintado Pit #1 as a material source had not been obtained.

⁸ GX-Q.

⁹ AX-I.

The asphaltic price uncertainties may have existed with or without appellant's knowledge prior to the end of the acceptance period, but it is clear that appellant was aware of such uncertainties when asked to extend the bid acceptance period because it qualified the extension to avoid the potential losses due to the uncertain asphaltic pricing situation. Appellant could have refused to extend the bid period and thereby been protected against such potential losses. Instead, appellant granted the extension with a qualification to afford protection against the potential losses. Clearly, there is a significant difference between appellant's position prior to extension of the bid acceptance period and the extended qualified acceptance period. Even if Chevron's bid had expired 15 days after the bid opening on Nov. 14, 1973, as indicated by the Government, there was nothing to require appellant to give a bid acceptance extension on the same terms as the Government enjoyed during the original acceptance period. Whether or not appellant was in a position of risking great losses during the last 45 days of the original acceptance period, appellant had the right to refuse to extend the acceptance period or to attach conditions to the extension it did grant.

We find that the qualification of appellant's extension of the bid acceptance period was proper and accepted by the Government upon award of the contract during such extension.

The Government's second and third arguments will be treated to-

gether since the negotiations for Change Order No. 2 which is claimed to constitute an accord and satisfaction were conducted by the representatives whose authority to bind the Government is disavowed in the third contention. Mr. Ward and Mr. Dzick were the representatives for the BIA area office assigned to meet with appellant on Aug. 2, 1974, to consider the first post award price increase for asphaltic materials. Appellant claims that the purpose of the meeting was to negotiate an open ended contract agreement to cover past and future price increases in asphaltic materials (Tr. 44). The Government contends that the meeting was to negotiate a single price increase for asphaltic materials that did, upon appellant's acceptance, satisfy completely the qualified bid acceptance; and that, to the extent that either Mr. Ward or Mr. Dzick may have indicated otherwise, their lack of authority to bind the Government makes such declarations a nullity.

Change Order No. 2 does not contain clear language helpful to resolution of the issue. The explanatory paragraph preceding the authorization of a price increase of \$189,000.30 under the changes clause states:

Reference is made to your Contract No. NOO C 1420 6159 dated February 8, 1974 covering construction of 15.474 miles of roadway west of Whitehorse to Pueblo Pintado, New Mexico and to our meeting of August 2, 1974 in regards to the increased costs encountered by you because of the delay in making award.

The Change Order is signed by "Henry Wright, Acting Chief,

March 8, 1979

Branch of Contracting and Procurement Services." Mr. Wright did not attend the meeting of Aug. 2, 1974. The Change Order was acknowledged and accepted by appellant on Aug. 7, 1974, and returned to the BIA with a transmittal letter¹¹ of the same date stating:

As per our discussions and verbal agreement at the meeting of August 2, 1974, attended by Mr. Walter Dzick, Mr. Eddie Ward, Mr. Cal J. Rickel, Mr. William Nielson and Mr. Edward Cook, we accept the enclosed signed Change Order No. 2 with the condition that should the costs of the bituminous materials increase over the current prices due to scarcity, fluctuating market and/or the national energy crisis we have the right to claim reimbursement for the additional costs involved to purchase these bituminous materials.

At the Aug. 2 meeting, Mr. Ward and Mr. Dzick represented the BIA. Mr. Rickel and Mr. Nielson represented appellant and Mr. Cook represented Chevron. Mr. Ward testified that the intent of the meeting, according to his instructions from the contracting officer, was to get the price for asphaltic material that day (Tr. 96-100). Mr. Nielson (Tr. 83) and Mr. Rickel (Tr. 42) testified that they sought to discuss the means to be reimbursed for future increases in asphaltic materials. The current price for the asphaltic materials was easily determined since Mr. Cook of Chevron was present. However, agreement could not be reached on future increases. Mr. Rickel (Tr. 45), Mr. Nielson (Tr. 80-81), Mr. Ward (Tr. 133), and

Mr. Dzick (Tr. 151-2) all testified to collaborating in the drafting of a letter to address appellant's concern about future price increases. The resulting letter became the appellant's letter of Aug. 7, 1974, transmitting the signed Change Order No. 2. The change order contained a price adjustment based only on the prices for asphaltic materials on Aug. 2, 1974. Mr. Dzick testified that the standard procedure is that the contractual document would be prepared, sent to the contractor for signature, and then signed by the contracting officer when the contractor's signed copy was received (Tr. 150).

[1] The Government argues that Messrs. Ward and Dzick did not have the authority to bind the Government to any agreements as to future increases and that the right to claim reimbursement as used in the letter of Aug. 7, 1974, is different than a right to reimbursement. Whether the BIA representatives at the Aug. 2 meeting had authority is not necessary to decide. They were the representatives sent to determine the effect that the price of asphaltic material on that day would have on the contract. They determined this to be \$189,000.30. Additionally, they heard the appellant's concerns expressed at the meeting that future price increases would need to be reimbursed and participated in drafting a letter for appellant's use in that regard. The contracting officer chose these representatives as his instruments of communication with appellant in

¹¹ AF-D.

the meeting to resolve the qualified acceptance of the bid. Whether they reported back all that occurred at the meeting or just the contract price increase necessary to adjust the contract to current asphaltic material prices is not conclusive. The remainder of the meeting results were communicated to the contracting officer in the Aug. 7 transmittal letter of Change Order No. 2, advising of appellant's conditions for acceptance of Change Order No. 2.

The transmittal letter clearly states the appellant's conditional acceptance of the Change Order based on the meeting of Aug. 2 and the expectation that additional price increases beyond that date could be claimed. Therefore, regardless of the authority of the BIA representatives at the meeting, the complete results of the meeting were reported to the contracting officer before he signed Change Order No. 2, *i.e.*, the current cost impact of price increases and the appellant's expectation that any additional increases would provide the basis for a claim for reimbursement. Consequently, a fully informed contracting officer signed the Change Order conditioned by a contemporaneous letter and accepted continued performance of the contract for 2 months before his letter of Oct. 2, 1974, in which he denies responsibility for additional price increases.

[2] Under these circumstances, the Government's claim that Change Order No. 2 constituted an

accord and satisfaction must fail. There was a failure at the Aug. 2 meeting to have a meeting of the minds on the issue of whether the agreed upon increases were to cover increases to date or the entire contract because of the limited authority of the BIA representatives to consider anything other than increases to that date. Lacking a meeting of the minds, there could not be a new agreement of accord and satisfaction to replace the prior agreement of the parties regarding future price increases.

Additionally, upon signing Change Order No. 2, the contracting officer was fully aware that appellant had not agreed that the price increase in that document was sufficient to provide for the uncertain price fluctuations that might occur in the future. Neither appellant nor the Chevron representative were even asked to project the cost impact of asphaltic price increases over the contract period. It strains credulity to believe that the contracting officer would consider that a contract price adjustment based only on prices on Aug. 2, 1974, would be acceptable when the prices of these materials would be the prices in effect at the time of delivery and the bulk of such materials would not be delivered to the project until later stages of the contract performance. In this instance, we cannot agree with the contention of the Government that both parties must be presumed to have intended or recognized a distinctive difference between the phrases:

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"right to claim reimbursement" and "right to reimbursement." It is clear that only the Government considered the language to give the right to summarily deny claims for actual price increases in asphaltic materials after Aug. 2, 1974.

Therefore, we find the Change Order No. 2 was only conditionally accepted by the contractor and was therefore not an accord and satisfaction. We further find that the effect of the contracting officer signing and processing the Change Order without taking any exception to the terms outlined in the transmittal letter of Aug. 7, 1974, for a period of 2 months, was to acquiesce in such terms as the basis for payment of future price increases for asphaltic materials.

DECISION

The parties having agreed to limit the presentation of the instant appeal to the question of entitlement, we find that appellant is entitled to an equitable adjustment for price increases in materials procured for Items 312(2) and 403(2) after Aug. 2, 1974, plus interest pursuant to Clause 37, "Payment of Interest on Contractors' Claims," from the date of appeal of the contracting officer's adverse decision on Sept. 13, 1976.¹²

The appeal is remanded to the contracting officer for a determina-

tion of the amount of the equitable adjustment and interest.

RUSSELL C. LYNCH,
Administrative Judge.

WE CONCUR:

BERYL S. GILMORE,
Administrative Judge.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

APPEAL OF RAYMOND A. KREIG

3 ANCAB 168

Decided March 9, 1979

Appeal of Raymond A. Kreig, from the Bureau of Land Management Decision #F-14912, dismissed Mar. 9, 1979.

1. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Preference rights to purchase set forth in Public Land Order No. 1613, Apr. 7, 1958, that were outstanding as of the date of the passage of ANCSA, are valid existing rights protected by ANCSA.

2. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights—Alaska Native Claims Settlement Act: Conveyances: Generally

Valid existing rights held by third parties that lead to acquisition of title, must be identified in the conveyancing document and the land covered thereby excluded from the conveyance to the selecting Native corporation.

APPEARANCES: Raymond A. Kreig, pro se; M. Francis Neville, Esq., Office

¹² AF-N. The date that interest commences under Clause 37 is "from the date the contractor furnishes to the contracting officer his written appeal under the disputes clause of the contract."

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"right to claim reimbursement" and "right to reimbursement." It is clear that only the Government considered the language to give the right to summarily deny claims for actual price increases in asphaltic materials after Aug. 2, 1974.

Therefore, we find the Change Order No. 2 was only conditionally accepted by the contractor and was therefore not an accord and satisfaction. We further find that the effect of the contracting officer signing and processing the Change Order without taking any exception to the terms outlined in the transmittal letter of Aug. 7, 1974, for a period of 2 months, was to acquiesce in such terms as the basis for payment of future price increases for asphaltic materials.

DECISION

The parties having agreed to limit the presentation of the instant appeal to the question of entitlement, we find that appellant is entitled to an equitable adjustment for price increases in materials procured for Items 312(2) and 403(2) after Aug. 2, 1974, plus interest pursuant to Clause 37, "Payment of Interest on Contractors' Claims," from the date of appeal of the contracting officer's adverse decision on Sept. 13, 1976.¹²

The appeal is remanded to the contracting officer for a determina-

tion of the amount of the equitable adjustment and interest.

RUSSELL C. LYNCH,
Administrative Judge.

WE CONCUR:

BERYL S. GILMORE,
Administrative Judge.

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¹² AF-N. The date that interest commences under Clause 37 is "from the date the contractor furnishes to the contracting officer his written appeal under the disputes clause of the contract."

of the Regional Solicitor, on behalf of the Bureau of Land Management; Elizabeth S. Taylor, Esq., on behalf of Doyon, Ltd.

OPINION BY

ALASKA NATIVE CLAIMS APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, and Part 4, Subpart J (1975), hereby makes the following findings, conclusions and decisions dismissing the appeal from the Decision of the State Director, Bureau of Land Management # F-14912.

On July 27, 1978, appellant filed a Notice of Appeal from the above-referenced decision. Appellant alleges that he has an interest in lands between the boundary line of U.S. Survey 2911 and the centerline of the Alaska highway which are located in Sec. 29, T. 15 N., R. 19 E., C.R.M. This land claimed by appellant has been approved for conveyance to Northway Natives, Inc., and Doyon, Ltd., pursuant to ANCSA. Appellant claims he has a right to purchase this highway frontage pursuant to the preference rights provision of Public Land Order 1613 of Apr. 7, 1958. The history of this parcel of land has been set forth as follows by the parties.

On Aug. 10, 1949, PLO 601 was enacted which reserved for highway

purposes the public lands in Alaska within 300 feet of each side of the centerline of certain highways, including the Alaska highway. On May 5, 1954, Nell Kelley, appellant's predecessor in interest, received patent to U.S.S. 2911 which was adjacent to the Alaska highway reserve. On Apr. 7, 1958, the reservation set out in PLO 601 was revoked by PLO 1613. Public Land Order 1613 was issued by the Secretary of the Interior pursuant to legislation which permitted the Secretary to dispose of the land withdrawn for highway purposes after revocation of the withdrawal and after reservation of an easement for the highway. While this legislation permitted the Secretary to sell such formerly withdrawn land and reserve as easement for the highway, the legislation stated that the Secretary was to give an appropriate preference right to adjoining land owners and persons with valid unperfected entries. This legislation has been codified in 43 U.S.C.A. § 971a through e (West Supp. 1978). (70 Stat. 898, Aug. 1, 1956.) Secs. 971a and 971b which are relevant to the instant appeal state as follows:

§ 971a. Alaskan lands within highway, telephone, and pipeline withdrawals; disposal; amendment of land description of claim or entry on adjoining lands.

Upon revocation of a withdrawal for highways, telephone lines, or pipelines, in Alaska, the lands involved shall be subject to disposal only under laws specified by the Secretary of the Interior, subject to easements as established by the Secretary. Notwithstanding any statutory limitation on the area which may be included in an unpatented claim or entry, the Sec-

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retary may permit the amendment of the land description of a claim or entry on adjoining lands to include the restored lands.

Aug. 1, 1956, c. 848, § 1, 70 Stat. 898.

§ 971b. Same; sale; preference rights; consent of Federal agency.

The Secretary may sell such restored lands for not less than their appraised value, giving an appropriate preference right to the holders of adjoining claims or entries and to owners of adjoining private lands. If such lands are under the jurisdiction of a Federal department or agency other than the Department of the Interior, any sale thereof shall be made only with the consent of such department or agency.

Aug. 1, 1956, c. 848, § 2, 70 Stat. 898.

Pursuant to this statute, the Secretary issued PLO 1613 which revoked the withdrawal of certain highway reserves in Alaska, and in paragraph 7 of such order set forth preference rights of adjoining land owners. This paragraph states as follows:

The lands released from withdrawal by paragraphs 1 and 2 of this order, which, at the date of this order, adjoin lands in private ownership, shall be offered for sale at not less than their appraised value, as determined by the authorized officer of the Bureau of Land Management, and pursuant to Section 2 of the act of August 1, 1956, *supra*. Owners of such private lands shall have a preference right to purchase at the appraised value so much of the released lands adjoining their private property as the authorized officer of the Bureau of Land Management deems equitable, provided, that ordinarily, owners of private lands adjoining the lands described in paragraph 1 of this order will have a preference right to purchase released lands adjoining their property, only up to the centerline of the highways located therein. Pref-

erence right claimants may make application for purchase of released lands at any time after the date of this order by giving notice to the appropriate land office of the Bureau of Land Management. Lands described in this paragraph not claimed by and sold to preference claimants may be sold at public auction at not less than their appraised value by an authorized officer of the Bureau of Land Management, provided that preference claimants are first given notice of their privilege to exercise their preference rights by a notice addressed to their last address of record in the office in the Territory in which their title to their private lands is recorded. Such notice shall give the preference claimant at least 60 days in which to make application to exercise his preference right; and if the application is not filed within the time specified, the preference right will be lost. Preference right claimants will also lose their preference rights if they fail to pay for the lands within the time period specified by the authorized officer of the Bureau of Land Management, which time period shall not be less than 60 days.

Thus, as of Apr. 7, 1958, the effective date of PLO 1613, the reservation of the lands between U.S.S. 2911 and the centerline of the Alaska highway was revoked. Nell Kelley could have made application to purchase such formerly reserved lands which adjoined U.S.S. 2911, pursuant to PLO 1613. There is no evidence that Nell Kelley ever made such an application.

On Dec. 18, 1971, the Alaska Native Claims Settlement Act was passed by Congress. Sec. 11(a) of this Act withdrew certain public lands within Alaska, subject to valid existing rights, from all forms of appropriation under the public

land laws including mining and mineral leasing laws and from selection under the Alaska Statehood Act. Included within this withdrawal were those lands located within Sec. 29, T. 15 N., R. 19 E., C.R.M., which were withdrawn for the benefit of Northway Natives, Inc., and Doyon, Ltd.

Pursuant to § 12(a) of ANCSA, Northway Natives, Inc., filed a village selection application for those lands in Sec. 29, T. 15 N., R. 19 E., and on June 26, 1978, the Bureau of Land Management issued a decision for interim conveyance approving for conveyance to Northway Natives, Inc., the surface estate to Sec. 29, T. 15 N., R. 19 E., C.R.M., excluding U.S.S. 2911, Native Allotments F-12950 and F-14316, Parcel B, Chisana River, Nabesna River, and Tanana River. The subsurface estate was to be conveyed to Doyon, Ltd.

On July 27, 1978, appellant filed a Notice of Appeal with the Board. In this document appellant stated that he was currently buying all of the land in U.S.S. 2911 and that as soon as the purchase documents could be recorded he would be making application for the land between U.S.S. 2911 and the Alaska highway, pursuant to PLO 1613.

From documents filed with the Board it appears that on Aug. 23, 1978, a personal representative's deed was signed by the Executrix of the estate of Nell Kelley conveying to appellant all land within U.S.S. 2911. The file indicates that on Sept. 5, 1978, appellant filed his application with the BLM to purchase the

land between U.S.S. 2911 and the Alaska highway.

Appellant has alleged that he has a valid existing right to the lands in question pursuant to PLO 1613 and that he is seeking these lands in order to have access from U.S.S. 2911 to the Alaska highway.

The Bureau of Land Management argues that the preference rights set forth in PLO 1613 do not have an expiration date, have not been extinguished, and therefore persons such as appellant who are owners of land adjoining the former Alaska highway withdrawal have a valid existing right to those purchase lands mentioned in PLO 1613.

Doyon, Ltd., the Native Corporation which is to receive the subsurface estate of land selected by Northway Natives, Inc., has alleged that appellant has no valid existing right to the land in question. They state that on Dec. 18, 1971, Congress withdrew these lands from "all forms of appropriation" under § 11 of ANCSA. At this time no application for purchase under PLO 1613 had been filed by appellant or his predecessor in interest and in fact was not filed until after Northway Natives, Inc., received a decision to convey these lands. Doyon contends that appellant and his predecessors, having failed to exercise their preference right prior to withdrawal and selection by Northway, and having failed to initiate a lawful entry prior to Aug. 31, 1971, as is required by § 22(b) of ANCSA, lost whatever preference right they might have had under PLO 1613.

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The issue to be resolved in this appeal is whether the preference rights created in PLO 1613 are valid existing rights protected by ANCSA.

Nothing in either ANCSA or its implementing regulations specifically mentions PLO 1613 or the legislation from which it arose. ANCSA does, however, protect valid existing rights. Sec. 11 of ANCSA, which is entitled "Withdrawal of Public Lands," states in § 11(a) (1) that:

The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, * * *.

Furthermore, § 14 of ANCSA, which is entitled "Conveyance of Lands," states in subparagraph (g) in part as follows:

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. * * *

In interpreting what interests are included within the meaning of the term "valid existing rights" under ANCSA, the Secretary of the In-

terior has determined that certain rights of purchase held by third parties which were outstanding but unperfected as of the date of passage of ANCSA constitute "valid existing rights." Secretarial Order 3029 of Nov. 20, 1978 (43 FR 55287, Nov. 27, 1978), entitled "Valid Existing Rights Under the Alaska Native Claims Settlement Act" addressed in part the question of whether or not leases created by the State of Alaska on land tentatively approved to the State but made selectable for Native corporations under ANCSA, and the purchase rights to the land created by A.S. 38.05.077, were valid existing rights.

In discussing valid existing rights under ANCSA, the Solicitor's Opinion adopted by Secretarial Order No. 3029 as the position of the Department on the subject of valid existing rights, stated in part as follows:

A fundamental principle of ANCSA is that "[a]ll conveyances made pursuant to this Act shall be subject to valid existing rights." In addition, the sections withdrawing land for Native selection (Sections 11(a), 16(a)) expressly provide that the withdrawal is "subject to valid existing rights." The revocation of prior reserves created for Natives is also "subject to valid existing rights." (Section 19(a)).

Although the phrase "valid existing rights" is not specifically defined in Section 3 "Definitions", both the statute and the legislative history offer guidance as to its meaning.

Section 14(g) provides in pertinent part:

"Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement

(including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued * * * the patent shall contain provisions making it subject to the lease, contract (etc.) * * *"

Section 22(b) directs the Secretary "to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites or small tract sites, and who have fulfilled all the requirements of law prerequisite to obtaining a patent."

Section 22(c) protects persons who have initiated valid mining claims or locations in their possessory rights if they have met the requirements of the mining laws.

By regulation the Department has construed Sections 14(g) and 22(b) and provided the mechanism for implementing them. 43 CFR 2650.3-1(a) provides:

"Pursuant to sections 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entry or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under section 6(g) of the Alaska Statehood Act), contracts, permits rights-or-way [sic], or easements."

* * * I do not believe the listing of the rights to be protected was intended to be limiting, but rather was *ejusdem generis*. The regulation already quoted (43 CFR 2650.3-1(a)) precedes its list with "such as those created by * * *," indicating clearly that the list is not exhaustive. Furthermore, there is not longical [sic] reasons why Congress would have intended to protect rights of municipalities or individuals which lead to the acquisition of title under such Federal laws as the Townsite Act or the Homestead Act, but did not intend to

protect the same municipality or individual when the law under which the rights are being perfected is a State law.

It is my conclusion, therefore, that the department's regulations have construed "valid existing rights" under ANCSA to include rights *perfected or maintained under State as well as Federal laws leading to the acquisition of title*. (Italics added.)

This Solicitor's Opinion then concluded that leases issued by the State of Alaska under its "open-to-entry" leasing program prior to the passage of ANCSA, together with the outstanding right to purchase set forth by State statute, were valid existing rights which were to be excluded from the conveyance to the Native corporations.

It is clear from this Secretarial Order that valid existing rights are not limited to leases, contracts, permits, rights-of-way or easements mentioned in § 14(g) of ANCSA, but include other interests whether or not they are specifically set forth in ANCSA. Included within the meaning of the term valid existing rights are interests which are of a temporary or limited nature and interests which lead to the acquisition of title. Furthermore, if such interests were created prior to ANCSA they are to be considered valid existing rights if they have been perfected or if they are being maintained in conformance with the law under which they were created.

The purchase rights granted to the State issued open-to-entry leaseholders in A.S. 38.05.077 are in many way analogous to the preference rights to purchase here under consideration. The purchase rights

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associated with the open-to-entry leases were rights granted by statute. The preference rights provision of PLO 1613 was issued pursuant to Federal statute. The purchase rights set forth in A.S. 38.05.077 which are protected as valid existing rights are associated with a leasehold interest granted to third parties by the State of Alaska prior to ANCSA. Secretarial Order 3029 did not require the holder of the lease to assert the right of purchase within a time frame prior to ANCSA. The preference rights provision of paragraph 7 of PLO 1613 which is here under consideration is associated with lands transferred to private ownership prior to the passage of ANCSA and had no set date required for perfection. Both the purchase rights set forth in A.S. 38.05.077 and the preference rights of purchase set forth in PLO 1613 were outstanding rights as of the date of passage of ANCSA. Furthermore, as of this date, neither the purchase rights set forth in A.S. 38.05.077 nor the preference rights of PLO 1613 have ever been terminated.

Besides the above-quoted language of ANCSA and Secretarial Order 3029, there is further language in ANCSA which indicates that Congress intended to protect rights such as those preference rights set forth in PLO 1613. Throughout ANCSA, Congress recognized and gave protection to various rights of access. Sec. 17(b) (2) of the Act provides that the Federal-State Land Use Planning

Commission is to identify certain public easements across Native land. While most of the language in this section deals with easements for public use, paragraph 2 of this section mentioned other rights of access. This paragraph states as follows:

In identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall receive and review statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements: *Provided, That any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.* (Italics added.)

The appellant in the present case has alleged that he is seeking to exercise the preference rights of paragraph 7 of PLO 1613 in order to provide access from the property he owns to the Alaska highway. Prior to the issuance of PLO 1613, the property owned by appellant adjoined the Alaska highway and had direct access to the highway. With the issuance of PLO 1613, the land between appellant's property and the centerline of the Alaska highway reverted to an unreserved status and appellant no longer had direct access to the highway. It appears from PLO 1613 and the legislation from which it arose, that the preference rights of adjoining land holders to purchase land between such privately held land and the

centerline of the Alaska highway was intended, at least in part, to prevent such privately held lands from being denied access to the Alaska highway.

[1, 2] Based upon language in ANCSA and its implementing regulations, and the policy of the Department of the Interior as set forth in Secretarial Order 3029, the Board finds that the preference rights to purchase set forth in paragraph 7 of PLO 1613 that were outstanding as of the date of the passage of ANCSA and that are being maintained in conformance with the requirements of PLO 1613, are valid existing rights protected by ANCSA, even though such rights lead to the acquisition of title. Pursuant to 43 CFR 2650.3-1(a) and Secretarial Order 3029, such rights which lead to the acquisition of title must be identified in the conveyancing document and land covered thereby excluded from the conveyance to the selecting Native corporation.

The allegation by Doyon, Ltd., that appellant's rights cannot be a "valid existing right" because he has not complied with § 22(b) of ANCSA, is without merit. Sec. 22(b) of ANCSA specifically deals with acquiring title to homesteads, trade and manufacturing sites, headquarters sites and small tract sites. Appellant is not claiming that his rights arise from any of these four specific laws and therefore § 22(b) is not dispositive of the issue in this appeal.

The preference right given to the owner of U.S.S. 2911 by paragraph 7 of PLO 1613 had not been extinguished and was outstanding as of the date of passage of ANCSA. Appellant, as the owner of U.S.S. 2911, has an application pending before the Bureau of Land Management to purchase land pursuant to PLO 1613. At the present time there has been no adjudication by the Bureau of Land Management on appellant's application. The Board, having found that the outstanding preference rights created in PLO 1613 are valid existing rights as that term is used in ANCSA, hereby finds that the land covered by appellant's application must be identified and excluded from the conveyance to Northway Natives, Inc., pending the adjudication of the claim of appellant.

Pursuant to the above findings, the Board hereby segregates from the above-referenced decision to convey those lands lying between U.S.S. 2911 and the centerline of the Alaska highway for which appellant has made application, and remands such land to the Bureau of Land Management for a determination on appellant's application filed pursuant to PLO 1613. Based upon the reasoning set forth in Secretarial Order 3029, those lands which the Bureau of Land Management determines are to be conveyed to appellant pursuant to paragraph 7 of PLO 1613, if any, are to be excluded from conveyance to Northway Natives, Inc., and the remain-

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ing lands conveyed to Northway Natives, Inc.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
*Chairperson, Alaska Native
Claims Appeal Board.*

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

APPEAL OF YOSEMITE PARK AND CURRY COMPANY

IBCA-1232-12-78

Decided March 16, 1979

Contract No. NPS-WASO-IX-63-2,
National Park Service.

Government Motion to Dismiss
Granted.

1. Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Ap- peals: Motions

A claim by a concessioner under a National Park Service Contract is dismissed as beyond the purview of the Board's jurisdiction where the contract contains no Disputes clause and by its express terms the Contract Disputes Act of 1978 is not applicable to the claim asserted.

APPEARANCES: Messrs. Richard A. Solomon and Dennis Lane, Attorneys at Law, Wilner & Scheiner, Washington, D.C., for appellant; Mr. John S. McNunn, Department Counsel, San Francisco, Calif., for the Government.

OPINION BY CHIEF ADMIN- ISTRATIVE JUDGE MCGRAW

INTERIOR BOARD OF CON- TRACT APPEALS

The Government has filed a motion to dismiss the instant appeal for lack of jurisdiction on the grounds that the contract contains neither an equitable adjustment provision nor a Disputes clause. The appellant has filed an opposition to the motion. The complaint and the answer have been filed. Neither party has requested a hearing on the jurisdictional question presented.¹

The contract here in issue was entered into under date of May 9, 1963, for a term of 30 years commencing Oct. 1, 1963, provided certain conditions were satisfied. Under the contract terms the concessioner (hereinafter referred to as the contractor), was committed to expending not less than specified sums upon capital improvements by specific times with a view to providing the public visiting Yosemite National Park with accommodation facilities and services at reasonable rates under the supervision and regulation of the Secretary.

For the most part, the electricity required for the accommodations and other facilities furnished to the visitors to the park appears to have

¹ The appellant filed with the Board on Feb. 26, 1979, a document entitled "Application for Oral Hearing And To Convene A Prehearing/Presubmission Conference." The application presupposes our retention of jurisdiction.

been obtained at approved rates from electricity sold to the contractor by Pacific Gas and Electric Co. and by the Southern California Edison Co. According to the complaint, however, a substantial portion of the electric power and energy supplied the park's visitors is generated at the National Park Service own hydroelectric facilities located in the park. The gravamen of the complaint is that the contractor is being charged excessive rates for the portion of the electricity supplied from the National Park Services own generating facilities.²

The following is quoted from contract provisions relied upon by the parties:

SEC. 3. Plant, Personnel, and Rates.

(b) (1) All rates and prices charged to the public by the Concessioner for accommodations, services, or goods furnished or sold hereunder shall be subject to regulation and approval by the Secretary, not inconsistent with an opportunity for the Concessioner to make a fair profit from the total of its operations

² Addressing itself to the merits of the appeal, the Government states:

"In effect the Company in its Appeal is seeking an order compelling the Government to subsidize it by selling it power at a below-market rate while charging its customers market rates for services and accommodations in the Park. * * *

"It is the position of the Government that the 'value to the recipient' of electric power provided the Company at Yosemite is the price which the Company would necessarily have had to pay for power if power had not been provided to it by the Government. That price is determined by looking to the rates for power under comparable conditions outside Yosemite National Park's boundaries. That is precisely how Government electric rates are determined at Yosemite today."

(Government Answer, pp. 5 and 6.)

hereunder. In determining fair profit for this purpose, consideration shall be given to the rate of return required to encourage the investment of private capital and to justify the risk assumed or the hazard attaching to the enterprise; the cost and current sound value of capital assets used in the operation; the rate of profit on investment and percentage of profit in gross revenue considered normal in the type of business involved; the financial history and the future prospects of the enterprise; the efficiency of management; and other significant factors.

(2) Reasonableness of rates and prices will be judged primarily by comparison with those currently charged for comparable accommodations, services, or goods furnished or sold outside of the areas administered by the National Park Service under similar conditions, with due allowance for length of season, provision for peak loads, average percentage of occupancy, accessibility, availability and cost of labor and materials, type of patronage, and other conditions customarily considered in determining charges, but due regard may also be given to such other factors as the Secretary may deem significant.

SEC. 6. Utilities. (a) The Secretary shall furnish utilities to the Concessioner, when available, and at reasonable rates to be fixed by the Secretary for use in connection with the operations authorized hereunder.

SEC. 22. General Provisions. (a) Operations under this contract shall be subject to the laws of Congress governing the park and the rules and regulations promulgated thereunder, whether now in force or hereafter enacted or promulgated.

(b) Reference in this contract to the "Secretary" shall mean the Secretary of the Interior, and the term shall include his duly authorized representatives.

The appellant opposes the granting of the Government's motion to

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dismiss on the grounds (i) that the motion is based upon a narrow reading of the contract and applicable regulations;³ (ii) that the Board has jurisdiction over a dispute if there are factual questions to be resolved;⁴ and (iii) that the motion overlooks the fact that the guidelines⁵ which the Government pur-

ported to apply in fixing the rates for utility service to the contractor and in rejecting the contractor's request for relief expressly provide for an appeal to the Director, NPS "through channels," and other governing regulations⁶ make clear that such channels involve an appeal to this Board (Answer to Motion to Dismiss, p. 1).

In support of granting the motion the Government cites the decisions rendered in the cases of *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966): *American Cement Corp.*, IBCA-495-5-65 and IBCA-578-7-66 (Sept. 21, 1966), 73 I.D. 266, 66-2 BCA par. 5,849, *affirmed on reconsideration*, 74 I.D. 15, 66-2 BCA par. 6,065 (1967); *Pirates Cove Marina*, IBCA-1018-2-74 (Feb. 25, 1975), 75-1 BCA par. 11,109 (Motion to Dismiss, p. 2).

After delineating what it considers must be shown before the Board may exercise jurisdiction, the Government states:

furnished to concessioners and other non-federal users.

"3. The appraisal team must provide an opportunity for local participation by park management and the concessioners. Final rate determination will be made and discussed during the appraiser's field visit and will become effective subject only to appeal, through channels, to the Director."

(Answer to Motion to Dismiss, p. 2).

⁶ The governing regulations are identified as 43 CFR 4.1(1) from which the following is quoted:

"(1) Board of Contract Appeals. The Board considers and decides finally for the Department appeals to the head of the Department from findings of fact or decisions by contracting officers of any bureau or office of the Department, wherever situated, or any field installation thereof * * *"

(Answer to Motion to Dismiss, p. 3).

³ The appellant does not contend that the Contract Disputes Act of 1978 is dispositive of the jurisdictional question presented but rather contends that both the purpose for which the Act was passed, as well as its legislative history provide support for a liberal interpretation of the Board's authority. (Answer to Motion to Dismiss, p. 4, fn. 1.)

⁴ Apparently with a view to supporting this position, the appellant quotes the following passage from our decision on reconsideration in *American Cement Corp.*, IBCA-496-5-65 and IBCA-578-7-66 (Jan. 10, 1967), 74 I.D. 15, 24-25, 66-2, BCA par. 6,065, at 28,070:

"Claim No. 5 as presented is unquestionably a claim for lost profits. Over such claims we have no jurisdiction. Neither in the earlier proceedings nor in connection with the present motion has the Government shown that the claim, as stated, is cognizable under the Extras clause, the Changes clause or any other clause contained in the contract; nor has the Government shown that there are any facts in dispute which could confer jurisdiction * * *"

(Italics added by appellant; footnotes omitted.)

(Answer to Motion to Dismiss, p. 5).

Even when read literally, the underscored language in the above quote does not support the view that simply because there are facts in dispute the Board will assume jurisdiction. That was not the basis for retaining jurisdiction over some of the claims asserted in the *American Cement* case; nor are we aware of any such decisions by this Board. There are cases, of course, where hearings are held to resolve disputed factual questions where a finding favorable to one of the parties would provide a basis for granting relief. (E.g., a claim filed under the Changes clause where the appellant asserts and the Government denies an order to accelerate performance was issued.)

⁵ The guidelines are identified in appellant's opposition as an NPS Memorandum dated Jan. 10, 1974, furnished to all concessioners as the policy governing the establishment of electric rates from which the following is quoted:

"Subject: Restatement of policy and guidelines for establishing rates for utility services

The foregoing jurisdictional requirements have not been modified as applied to this Appeal by the Contract Disputes Act of 1978 (41 U.S.C. §§ 601, *et seq.*; 92 Stat. 2383). The Contract Disputes Act applies by its terms only to procurement contracts and to contracts for the disposal of personal property (41 U.S.C. § 602). Contract No. NPS-WASO-IX-63-2 falls under neither of these categories. It is a concession contract, subject to the provisions of Public Law 89-249 (16 U.S.C. §§ 20 *et seq.*; 79 Stat. 969).

(Government Answer, p. 3).⁷

Decision

[1] It is undisputed that the contract in issue does not contain a Disputes clause. Review of the contract discloses that it does not contain a "Changes" clause, a "Differing Site Conditions" clause or any other provision for equitable adjustment. Even if the contract contained a Disputes clause, we would still be without jurisdiction in this matter where, as here, the contract fails to include an equitable adjustment provision.⁸ Since the contract does

not contain a Disputes clause⁹ and since by its terms¹⁰ the Contract Disputes Act of 1978 does not apply to the claim here asserted, the Board is without authority¹¹ to remedy the wrong alleged.¹² Accordingly, the appeal is dismissed.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

WE CONCUR:

DAVID DOANE,
Administrative Judge.

RUSSELL C. LYNCH,
Administrative Judge.

⁷ See *Brent L. Sellick*, GSBCE No. 4912 (Apr. 26, 1978), 78-1 BCA par. 18,197; *Checker Van & Storage of Oakland, Inc.*, ASBCA No. 11,081 (Apr. 10, 1968); 68-1 BCA par. 6,991 at 32,330 ("Our jurisdiction is contractual and it is based on the provisions of the Disputes Clause. * * *").

⁸ Note 7, *supra*. The claim involved here is not being asserted under a contract entered into on or after the effective date of Mar. 1, 1979. It was neither pending then before the contracting officer, nor was it initiated thereafter.

⁹ In making the argument that the guidelines (note 5, *supra*) expressly provide for an appeal through channels to the Director and that other governing regulations (note 6, *supra*) make clear that such channels involve an appeal to this Board, the appellant appears to have overlooked the fact that it is the Secretary who is the head of the Department and for whom the Board acts in adjudicating contract disputes as fully and finally as he might. (See 43 CFR 4.1.) As evidenced by his signature on the copy of the contract attached to the Complaint, the then Director of the National Park Service signed the contract here in issue as the contracting officer.

¹² Since we are dismissing the claim for lack of jurisdiction, we express no opinion on the merits of the controversy. See *Cosmo Construction Co. v. United States*, 194 Ct. Cl. 559, 573 (1971) ("Incidental and gratuitous findings not relevant to a dispute over which the board had jurisdiction 'would have no finality whatsoever.'") (Footnote omitted.)

⁷ Under the caption "Effective Date of Act," the Contract Disputes Act of 1978 (P.L. 95-563, 92 Stat. 2383, 2391) provides:

"Sec. 16. This Act shall apply to contracts entered into one hundred twenty days after the date of enactment. Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter."

(41 U.S.C. § 601 note).

⁸ *Placer County, Calif.*, IBCA-777-5-69 (Apr. 8, 1971), 78 I.D. 113, 71-1 BCA par. 8,801; *Take Cleaners*, IBCA-1008-10-73 (May 10, 1974), 81 I.D. 258, 74-1 BCA par. 10,633; *Pirate's Cove Marina*, IBCA-1018-2-74 (Feb. 25, 1975), 75-1 BCA par. 11,109.

March 23, 1979

DEAN TRUCKING CO., INC.

1 IB SMA 105

Decided March 23, 1979

Appeal by the Office of Surface Mining Reclamation and Enforcement from those parts of an initial decision by Administrative Law Judge Tom M. Allen (in Docket Nos. CH8-12-R and CH9-4-R), dated Nov. 28, 1978, vacating three notices of violation issued by appellant under the provisions of the Surface Mining Control and Reclamation Act of 1977.

Remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Findings

The administrative law judge may frame findings of fact in any of a number of acceptable ways, but, however they are arrived at, findings must be sufficiently comprehensive and pertinent to form a basis for decision when measured against the evidence.

APPEARANCES: Billy Jack Gregg, Esq., Office of the Field Solicitor (Charleston), Michael Kurmian, Esq., Office of the Solicitor, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, all for appellant Office of Surface Mining Reclamation and Enforcement; L. Thomas Galloway, Esq., and Richard L. Webb, Esq., of the Center for Law and Social Policy for intervenors Council of the Southern Mountains, Inc., The Environmental Policy Institute, and the Appalachian

Coalition; and David R. Wooley, Esq., of Appalachian Research and Defense Fund, Inc., for intervenors The Tug Valley Recovery Center, Inc., and Save Our Mountains.

*OPINION BY THE INTERIOR
BOARD OF SURFACE MINING
AND RECLAMATION
APPEALS*

*Factual and Procedural
Background*

Acting on the basis of a citizens' complaint, Office of Surface Mining Reclamation and Enforcement (OSM) Inspector Ronnie Vicars visited the Dean Trucking Company's (Dean) surface mining operation in Big Stone Gap, Virginia, on Aug. 3 and Aug. 10, 1978, for the purpose of conducting an inspection under the Surface Mining Control and Reclamation Act of 1977 (Act).¹ On the later date the inspector issued a violation notice (designated 78-I-18-3) charging Dean with three separate violations of the Act and its regulations—(1) failure to pass all mine drainage through a sedimentation pond; (2) failure to erect perimeter markers; and (3) improper construction of a valley fill. Ultimately Dean abated the first two alleged violations. However, Dean refused to accept the validity of the notice in respect of the alleged valley fill regulation violation (§ 715.15(b),

¹ Act of Aug. 3, 1977, P.L. 95-87, 91 Stat. 445.

42 FR 62683-4 (Dec. 13, 1977)), and the inspector returned on two occasions, Aug. 29 and Sept. 27, 1978, each time writing a separate notice for Dean's additional alleged violations of that regulation.

On Sept. 5, 1978, Dean filed an application for review of the three violations alleged in the August 10 notice as well as the violation charged in the August 29 notice. Later, Dean separately applied for review of the September notice, and OSM moved for consolidation of the three notices (five alleged violations) for purposes of the hearing. The Administrative Law Judge (Judge) granted that motion and convened a hearing on Oct. 24, 1978, to review all of the alleged violations.

At the hearing it became clear that there was no serious challenge to the alleged violations regarding failure to erect perimeter markers and failure to construct a sedimentation pond. Dean has not appealed the Judge's ruling in favor of OSM on these violations. Regarding the alleged valley fill regulations violations, however, Dean argued that in order to prove such violations OSM must show that the alleged offending structure is a valley or head-of-hollow fill as defined in sec. 710.5 of the regulations (42 FR 62678 (Dec. 13, 1977)), and that OSM did not do so. OSM failed, according to Dean, to prove that the questioned structure did "encroach upon or obstruct" a natural stream channel which proof is necessary before a structure will be deemed a fill for purposes of the regulation.

The first sally of Dean's attack was to contradict OSM's factual

case by offering testimony of witnesses which disputed the testimony of OSM witnesses. OSM witnesses said that they could tell from what they saw in August and September that there had been a natural stream channel at the site before Dean began mining the area the previous year; Dean witnesses testified that there had never been a natural stream channel at that site during the entire course of their operations.

Dean's next assault was that even assuming that there had been a natural stream channel before Dean began its operation, there was no such channel when the Act and regulations became effective on May 3, 1978. According to this line of argument, Dean filled in the area before May 3 in accordance with the then-applicable law and permit conditions so that there no longer was any "natural stream channel" when the Act became effective. Thus, Dean argued that OSM could not prove the existence of the channel on May 3 and that therefore its spoil disposal operation was, both before and after May 3, within the confines of the law.

At the conclusion of the hearing a number of comments were made that contribute substantially to the action that will be taken by the Board. First, the Judge announced: "[Dean] constructed a valley fill without approval of the regulatory authority and not in compliance with section 715.15(b) * * *" (Tr. 150). Then, he stated:

I believe that there were in fact violations, but I do not believe that all of the violations were of the type that would require any civil penalty, and I'm not

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satisfied with remedial actions as [sic] least as to the hollow fill situation, and I wish to leave the record open for thirty days to provide the mine owner and OSM and the state authorities the opportunity to determine whether or not remedial means can be taken to eliminate the problem or problems in the future.

(Tr. 151).

Counsel for Dean then asked whether this was a final ruling. The Judge said it was not. Counsel replied that the reason he had inquired was to make certain his appeal time would not run. The Judge responded that that was why he said he would keep the record open. The hearing was then concluded upon the Judge's statement to counsel that "you are still invited to submit proposed findings of fact and conclusions of law" (Tr. 152).²

Over the next 30 days the parties met on various occasions but failed to agree on any remedial actions (letter of Nov. 20, 1978, from counsel for OSM to Administrative Law Judge). OSM also submitted proposed findings and conclusions.

In an opinion dated Nov. 28, 1978, the Judge, with his independent findings, vacated the notices on the ground that OSM "has not carried the burden of showing the existence of a violation under the Act or the interim regulations for reasons that the notice

of violation specified 'construction of a valley fill' and the evidence does not establish the area as a valley" (Decision at p. 4).

On Dec. 11, 1978, OSM filed its notice of appeal from that decision. On Jan. 16, 1979, five organizations petitioned the Board for leave to intervene in the case.³ By order dated Jan. 18, 1979, the Board granted the five leave to intervene in order to file a joint brief. Both OSM and the intervenors have now timely filed briefs. Dean has filed no brief.

Contentions on Appeal and Discussion

OSM and the intervenors argue that the holding of the Administrative Law Judge is erroneous, that his findings are inadequate, and that the Board should consider the matter de novo. Because the Board agrees that the findings are inadequate, it is not prepared to agree or disagree that the holding is incorrect. The Board declines to exercise any power it may have to consider matters de novo in an appeal where one of the parties is unrepresented.⁴

³ The organizations are Council of the Southern Mountains, Inc., The Environmental Policy Institute, The Appalachian Coalition, The Tug Valley Recovery Center, Inc., and Save Our Mountains.

⁴ Some observations by the late Lon Fuller concerning judges and advocates might prove illuminating.

"The Lawyer's Role as Advocate in Open Court"

* * * * *

"In a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by any arbiter who attempts to decide a dispute

² Previous to the foregoing quotations, the Judge had told counsel that they had the right to submit proposed findings along with a brief and argument. He stated his reluctance to rule from the bench and explained why. After the explanation, both counsel said they were prepared to take his ruling without briefing or argument. (Indeed, counsel for Dean said he had no intention to submit any brief (Tr. 146).)

The Administrative Procedure Act requires that opinions rendered pursuant to it contain findings of

F.N.4—Continued

without the aid of partisan advocacy. [Italics supplied.]

"Such an arbiter must undertake, not only the role of judge, but that of representative for both of the litigants. Each of these roles must be played to the full without being muted by qualifications derived from the others. When he is developing for each side the most effective statement of its case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving,—in analysis, patience and creative power. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.

"It is small wonder, then, that failure generally attends the attempt to dispense with the distinct roles traditionally implied in adjudication. * * *

"* * * It is only through the advocate's participation that the hearing may remain in fact what it purports to be in theory: a public trial of the facts and issues. Each advocate comes to the hearing prepared to present his proofs and arguments, knowing at the same time that his arguments may fail to persuade and that his proofs may be rejected as inadequate. It is a part of his role to absorb these possible disappointments. The deciding tribunal, on the other hand, comes to the hearing uncommitted. It has not represented to the public that any fact can be proved, that any argument is sound, or that any particular way of stating a litigant's case is the most effective expression of its merits.

"These, then, are the reasons for believing that partisan advocacy plays a vital and essential role in one of the most fundamental procedures of a democratic society. But if we were to put all of these detailed considerations to one side, we should still be confronted by the fact that, in whatever form adjudication may appear, the experienced judge or arbitrator desires and actively seeks to obtain an adversary presentation of the issues. Only when he has had the benefit of intelligent and vigorous advocacy on both sides can he feel fully confident of his decision.

"Viewed in this light, the role of the lawyer as a partisan advocate appears not as a regrettable necessity, but as an indispensable part of a larger ordering of affairs. * * *

"When advocacy is thus viewed, it becomes clear by what principle limits must be set to

fact and conclusions of law.⁵ Although the decision of the Judge contains a heading entitled "Discussion, Findings of Fact, and Conclusions of Law," it is not possible to ascertain those essential, ultimate facts which formed the framework against which the appropriate law is to be applied. The transcript does

partisanship. The advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case. He plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to a controversy, he distorts and obscures its true nature." L. L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 382-384 (1978) quoted section originally published as L. L. Fuller and J. D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958).

None of this is to indicate that either counsel was inadequate. Indeed, it is because the record indicates otherwise that we have chosen to bring up this important point at this time. Counsel for Dean told the administrative law judge that Dean was not going to submit proposed findings or a brief (Tr. 146). The court did not order but merely invited him to do so (Tr. 152). Dean, perhaps for reasons of economy, chose not to participate in an appeal brought by OSM. For that we cannot fault him, either. If our role were solely to pronounce a judgment which would affect only the parties, we would not be so troubled. But that is not the case. In addition to judging, we also explicate the existing policy of the Department. That explication has precedential value. For that reason alone, we require more than a "devil's advocate" from our own number to argue the other side. What we might state in Dean will create joy or sorrow in a variety of households that have an interest, not in Dean's particular business, but in the business of surface mining in general.

OSM has been represented from the beginning. Intervenor's joined it at the appellate level and, essentially, supported the position of OSM. Nobody, party or intervenor, has represented the interest held by Dean before the Board.

Although the right to intervene is not automatic, we refer interested persons to the generous intervention provisions of the regulations governing participation before the Hearings Division and this Board (43 CFR 4.1110).

⁵ 5 U.S.C. § 557 (1970).

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not help either, for as was noted earlier, the Judge there indicated findings that are totally inconsistent with some that are indicated in the written opinion.

In remanding this case to the Hearings Division, the Board is not telling the Judge that there is only one way to arrive at and frame findings. There are many. But however findings are arrived at, they are the Judge's responsibility⁶ and they must be sufficiently comprehensive and pertinent to form a basis for decision when measured against the evidence.⁷

Further, the Board is not limiting the Judge to drafting findings, nor does it intend to interfere with whatever power he possesses to reopen the record or reconsider the decision. The Board does require, at a minimum, that the findings indicate whether or not there was a valley or head-of-hollow on Aug. 2, 1977, and on May 3, 1978, and at any time after May 3, 1978, and whether such finding is based on the existence or nonexistence of evidence. If there was a valley or head-of-hollow on any of those dates, had it been filled and to what extent? Again, is that finding based on the existence or nonexistence of evidence? Also, does the Judge hold as a matter of law that a permit issued by the Commonwealth of Virginia before the passage of the

Act allows conduct otherwise prohibited by the Act? And, if that is so, does the state permit supervene the Act?

In regard to the statement on p. 9 of the decision that OSM "has not carried the burden of showing the existence of a violation," is the Judge referring to the "burden" set forth in 43 CFR 4.1171, which provides that "OSM shall have the burden of going forward to establish a prima facie case" while "[t]he ultimate burden of persuasion shall rest with the applicant for review," or is some other "burden" being invoked?

ORDER

Therefore, it is hereby ordered that the above-captioned case is remanded to the Hearings Division for further action not inconsistent with this opinion.

MELVIN J. MIRKIN,
Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

CHIEF ADMINISTRATIVE JUDGE
IRWIN CONCURRING:

I agree with what my colleagues have said and done in this case. I only want to add that what happened here is what troubled Mr. Justice Harlan in *United States v. El Paso Natural Gas Company* 376 U.S. 651, 663 (1964): "The real lack in this case is that the District Court wrote no opinion setting forth the reasoning underlying any of the subsidiary findings on dis-

⁶ See *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 413 F. Supp. 967, 973 (M.D. Tenn. 1976); *aff'd*, 570 F. 2d 554 (6th Cir. 1978), for a complete listing of cases concerned with the "proper" way of preparing findings.

⁷ *Schilling v. Schweitzer-Cummins Co.*, 142 F. 2d 82 (App. D.C. 1944).

puted issues of fact or connecting the subsidiary findings with its ultimate determination * * *."

WILL A. IRWIN,
Chief Administrative Judge.

APPEAL OF GENERAL CONSTRUCTION CORPORATION OF AMERICA BY FINANCIAL INDEMNITY CO., ITS SURETY

IBCA-1173-2-78

Decided *March 29, 1979*

Contract No. 14-16-0004-458, Fish and Wildlife Service.

Appeal Denied.

1. Rules of Practice: Appeals: Standing to Appeal

This Board approves the rule that a surety may prosecute and appeal in its own name when it enters into a takeover agreement to complete performance of a defaulted contract, but in the absence of such an agreement, the surety may appeal under the defaulted contract only in a representative capacity with the consent of its principal; the principal contractor on the defaulted contract.

2. Contracts: Disputes and Remedies: Termination for Default: Generally—Contracts: Disputes and Remedies: Damages: Liquidated Damages

Where the evidence shows no meeting of the minds between a completing surety and the Government on the matter of the surety's liability for liquidated damages, the Government does not waive the right to assess liquidated damages under a novation theory merely by allowing the surety, otherwise liable for liquidated damages under the contract, to complete

performance of the contract terminated for default.

APPEARANCES: Mr. Ernest R. Drosdick, Attorney at Law, Lowndes, Drosdick & Doster, Orlando, Florida, for appellant; Mr. Donald M. Spillman, Department Counsel, Atlanta, Georgia, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Factual and Procedural Background

On July 23, 1974, Contract No. 14-16-0004-458 was awarded by the Fish and Wildlife Service of the Department of the Interior (Government) to General Construction Corporation of America (contractor).¹ This was a construction contract executed on Standard Form 23 for the construction of an observation tower, a boat launching ramp, and parking facilities at the St. Marks National Wildlife Refuge, St. Marks, Florida. The contractor furnished a standard performance bond in the penal sum of \$114,743 which was duly executed on behalf of Financial Indemnity Company (surety) as the corporate surety.

The contractor received written notice to proceed with the work on Aug. 19, 1974. Work was begun on or about Aug. 20, 1974. By letter

¹ In this opinion the following abbreviations shall have the meanings ascribed: AF means Appeal File; (AF, 21) means item 21 of the Appeal File; Tr. means Transcript; (Tr. 41) means Transcript at page 41.

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dated Dec. 17, 1974, and received Dec. 24, 1974, the contractor informed the contracting officer of its financial inability to complete the contract and that the surety would do so with the surety's local agent in charge. Notice of termination for default was sent by letter to the contractor on Jan. 13, 1975, with a copy to the surety.

Although, both prior and subsequent to the notice of termination, considerable negotiations took place between the attorneys for the surety and the contracting officer in an attempt to accomplish a takeover agreement, none was ever consummated. However, the surety did, in fact, take over and did complete the contract on Sept. 30, 1975, without such an agreement. Completion occurred 99 days after June 23, 1975, the last day of the 308 calendar days of performance time allowed under the contract and change orders. The contract specified that liquidated damages were assessable against the contractor and its sureties at the rate of \$100 per day for each calendar day of delay. As a consequence, the contracting officer assessed \$9,900 liquidated damages against the surety.

In its claim to the contracting officer for relief from the assessment of liquidated damages, among other things, the surety argued: (1) that the delay was the fault of the Government because of its failure to promptly terminate the contract; and (2) that since there was no take-

over agreement reached, as a matter of law the Government has no right to assess liquidated damages against the surety.² By his Findings of Fact and Decision the contracting officer reduced the assessment by 30 days, or \$3,000, because of rainy weather. He rejected, however, the specific arguments set forth above and sustained the assessment of liquidated damages for 69 days, totaling \$6,900.

An appeal from that decision by the surety in its own name ensued.

Issues Presented on Appeal

On appeal to the Board, the surety contends that it should be relieved from liquidated damages on three counts: (1) that for a 75-day period, from Oct. 31, 1974, to Jan. 13, 1975, the surety was ready, willing and able to take over performance of the contract, and but for the inordinate delay caused by the Government's failure to promptly terminate the contract, would have done so; (2) that because the contract provided that the work was to commence within 10 days after receipt of written notice

² We note, however, that the cases cited to the contracting officer to support the "matter of law" argument were old cases which construed a contract clause pertaining to termination for default and the matter of liquidated damages which is far different from the clause on those subjects contained in the 1969 revision of general contract form 23A which is pertinent to this case. Apparently this is the reason why the appellant, in his posthearing brief, switched from the "matter of law" theory to the "novation" theory, discussed *infra*.

to proceed, which was received on Aug. 19, 1974, the date for commencement of the computation of performance time should have been Aug. 29, 1974, and not Aug. 20, 1974, thus entitling surety to 10 days or \$1,000 reduction in liquidated damages; and (3) that the provisions of the contract for assessment of liquidated damages are unenforceable against the surety because by allowing the surety to complete the work under the contract without a takeover, or completion, agreement, the Government waived the provisions for liquidated damages under the contract.

The Government, on the other hand, in addition to denying the allegations of the surety, contends on appeal that, as a matter of law pursuant to 41 U.S.C. § 256a (1976),³ the Board is without jurisdiction to remit liquidated damages and that only the Comptroller General is empowered to do so under a Government contract. Also, at the hearing, the Government moved to dismiss on the ground that the appellant, Financial Indemnity, had no standing to prosecute this appeal under the rule laid down in *Sentry Insurance Co.*, ASBCA No. 21918

(Aug. 5, 1977), 77-2 BCA par. 12,721. Ruling on the motion was reserved at the hearing. Thereafter, the motion was renewed during the posthearing briefing period and subsequently ruled upon by an opinion and order of the Board, as more particularly hereafter discussed.

Decision

Although we reject the contentions of the Government with respect to jurisdiction and standing, we hold, for the reasons more particularly discussed below, that the appellant has not sustained its burden of proving excusability from the payment of liquidated damages required by the contract. We prefer to discuss first the issues of jurisdiction and standing.

Jurisdiction

By asserting the truism that the Board is without jurisdiction to remit liquidation damages,⁴ the Government exposes a misconception of the theory of appellant's case. Although counsel for appellant did refer to the "remission" of liquidated damages in his brief, he is actually seeking relief from the assessment of liquidated damages.

³ Sec. 256a of Title 41, United States Code, reads as follows:

"§ 256a. Waiver of liquidated damages.

"Whenever any contract made on behalf of the Government by the head of any Federal Agency, or by officers authorized by him so to do, includes a provision for liquidated damages for delay, the Comptroller General upon recommendation of such head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable. (Sept. 5, 1950, ch. 849, § 10(a), 65 Stat. 591.)"

⁴ See *John Martin Co., Inc.*, IBCA-318 (Sept. 21, 1962), 1962 BCA par. 3,486; *Monarch Lumber Co.*, IBCA-217 (May 18, 1960), 67 I.D. 198, 60-2 BCA par. 2,674; *Samuel N. Zarpas, Inc.*, IBCA-24 (Jan. 4, 1956), 63 I.D. 1, 6-7, 6 CCF par. 61,756.

In *Zarpas* the Board said: "Whether the contractor is entitled to the remission of liquidated damages involves equitable considerations which are not for the Board to consider, since it is not authorized to make recommendations to the Comptroller General with reference thereto."

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In other words, appellant is contending that the assessment was wrongfully made, and wants that issue adjudicated on the merits.

One of the first cases to lay down the fundamental principle upon which a contractor may be relieved from liquidated damages was *United States v. United Engineering and Contracting Co.*, 234 U.S. 236, 243 (1914), where the Supreme Court quoted with approval the ruling of certain old English cases as follows:

[W]here performance of a condition has been rendered impossible by the act of the grantee himself, the grantor is exonerated from performance of it. * * * This principle is applicable not to building contracts only, but to all contracts. If a man agrees to do something by a particular day or in default to pay a sum of money as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time.

If this Board were to sustain the Government's position that this appeal should be dismissed simply because the Board is without jurisdiction to remit liquidated damages, we would be closing our eyes to a vast body of public contract cases where this Board, other Boards, and the courts have granted relief to appellant contractors who have met the required criteria for the application of the modern doctrine of "excusable cause for delay." See, e.g., *Addison Construction Co.*, IBCA-1064-3-75 (Sept. 29, 1976), 83 I.D. 353, 76-2 BCA par. 12,118; *Globe*

Construction Co., ASBCA No. 13316 (Sept. 10, 1971), 71-2 BCA par. 9,123; and *Hirsch v. U.S.*, 94 Ct. Cl. 602 (1941). We refuse to ignore this firmly established doctrine and hold the Government's remission theory to be inapplicable to the facts of this case.

STANDING

[1] We disposed of the Government's second contention, that the surety was without standing to prosecute this appeal, by our order, dated Nov. 29, 1978. In that order we held that the surety, in compliance with *Sentry Insurance Co.*, *supra*, had furnished to this Board, within the 20 days allowed after adjournment of the hearing, an adequate written consent from the contractor, permitting its representation by the surety in this appeal. We, therefore, denied the Government's motion to dismiss, but ordered that, since the surety did not enter into a takeover agreement, the style of this appeal must be changed to: "Appeal of General Construction Corporation of America, by Financial Indemnity Company, its Surety." We hereby reconfirm our approval of *Sentry Insurance Co.*, *supra*, which, as we stated in our opinion accompanying the aforesaid order, stands for the following proposition: A surety may prosecute an appeal in its own name when it enters into a takeover agreement to complete performance of a defaulted contract, but in the absence

of such an agreement, the surety may appeal under the defaulted contract only in a representative capacity with the consent of its principal, the principal contractor on the defaulted contract. *International Fidelity Insurance Co.*, AS BCA No. 22309 (Mar. 1, 1978), 78-1 BCA. par. 13,060.

We turn now to consideration of the specific claims of appellant.

Delay in Termination for Default

First, it is claimed that the Government wrongfully delayed, for a 75-day period, the termination of the contract after knowledge that the surety was ready, willing, and able to take over performance. At the hearing, the appellant called Mr. John H. Shugart, the contracting officer, as an adverse witness. His testimony included the following: that although the work performed by the contractor during the period from November 15 to December 15 was generally unsatisfactory (Tr. 17-19); and he knew, by virtue of a telephone conversation with an attorney for the surety on Nov. 11, 1974, that the surety wanted the contractor to be defaulted (Tr. 240), the inspection reports reflected, as of Nov. 15, 1974, that 49.4 percent of the work had been completed with only 28.5 percent of the completion time expired (Tr. 25); that this provided no basis for default (Tr. 25); that he received the notice from the contractor of its inability to perform on Dec. 24, 1974, and sent notice of termination on Jan. 13, 1975, which

was not an unreasonable length of time (Tr. 43, 44).

Mr. Shugart was the only witness testifying at the hearing and appellant offered no other evidence to establish its contention of undue delay in terminating for default. This evidence is not sufficient to convince us that the Government wrongfully delayed the termination. Therefore, the first count of appellant's claim cannot be sustained.

Computation of Performance Time

Secondly, appellant claims that the assessment of liquidated damages should be reduced by \$1,000 because the Government incorrectly computed the performance time. Appellant contends that since the contract provides that the work was to commence within 10 days after receipt of written notice to proceed, the Government erred in commencing to count the performance time on the first day after receipt, instead of 10 days after receipt of the notice to proceed.

At the hearing, the contracting officer testified that the notice to proceed was dated Aug. 14, 1974, was sent by certified mail and received by the contractor Aug. 19, 1974 (Tr. 46). This was verified by Item 6 of the Appeal File which was the notice to proceed. Item 1 of the Appeal File includes Standard Form 20, Invitation for Bids (Construction Contract), from which the following is quoted: "The undersigned agrees, if awarded the contract, to commence work within ten

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(10) calendar days after the date of receipt of notice to proceed, and to complete the work within Two Hundred & Forty (240) calendar days after date of receipt of notice to proceed." Mr. Shugart explained (Tr. 27-49) that the purpose of the 10 days is to give the contractor time to mobilize, move on, and get the work started; that the contractors are well aware of this; and that the 10 days is allowed before the contractor is questioned regarding his progress or lack of progress.

The express language of the contract is unambiguous and clearly indicates that the 240-day completion time starts to run on the first day after receipt by the contractor of the Notice to Proceed.

Again appellant offers no other evidence except the adverse testimony of the contracting officer and cites no legal authority to support its position on the computation of the performance time. The appellant clearly has not sustained its burden of proof with regard to the second count.

Waiver of Liquidated Damages by Novation

For the third count in its complaint, appellant asserts that the provisions of the contract for assessment of liquidated damages are unenforceable against the surety as a result of a waiver of liquidated damages by Government in allowing the surety to complete the work under the contract without the exe-

cution of a completion agreement. In its brief (p. 8) appellant contends that the surety and the Government entered into an entirely new oral agreement which constituted a novation wherein the surety agreed to undertake the completion of the project and the Government agreed to pay over to the surety the undisbursed construction funds as work progressed. However, appellant contends (Brief, p. 9) that the assessment of liquidated damages was not contemplated by the oral agreement and not agreeable to the surety.

By way of affirmative defense in its answer, the Government alleges: (1) that the surety did proceed with the work, even though no takeover agreement was signed; (2) that the surety was not delayed by any action of the Government and received payments jointly with the contractor; (3) that under Federal Procurement Regulations §1-18.803-6(c), a decision on whether to enter into a takeover agreement with a surety lies within the discretion of the contracting officer; and (4) the rights and obligations of the surety when no takeover agreement is executed are the same as if one had been executed.

[2] We are not persuaded that the circumstances of this case fit into the required criteria for a novation. First of all, as appellant points out on page 9 of its brief, one of the elements required for a novation is a meeting of the minds.

As indicated above, the appellant admits there was no meeting of the minds with regard to the assessment of liquidated damages for delay, provided for in the contract, and we so find. Secondly, according to sec. 424, *Restatement of the Law of Contracts*, published by the American Law Institute, a novation is a contract that (a) discharges immediately a previous contractual duty or a duty to make compensation, and (b) creates a new contractual duty, and (c) includes as a party one who neither owed the previous duty nor was entitled to its performance. Here, appellant has not shown that any previous contractual duty with regard to completion of the project or the payment of liquidated damages was discharged by the oral agreement between the surety and the Government. Also, appellant has neither adduced evidence to prove nor provided the citation of legal authorities to support the proposition that the surety here was not a party owing a duty under the contract. As indicated in the Findings of Fact and Decision of the contracting officer (AF, 33), liquidated damages are provided for in paragraph 5 of the General Provisions of the contract, sec. 27 of the General Conditions and paragraph 5 of the Special Conditions, and taken together, not only authorize, but require the assessment of liquidated damages for failure to complete the work within the specified time. Sec. 27 of the General Conditions, an integral part of the

contract, and entitled, "Liquidated Damages," reads in pertinent part as follows: "Whatever sums may be due ad [*sic*] liquidated damages may be deducted from payments due the Contractor or may be collected from his surety."⁵

We hold, therefore, that no novation has been established in the circumstances of this case and that appellant has failed to sustain its burden of showing entitlement to relief from the liquidated damages assessed. Accordingly, the appeal is denied.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

⁵ Federal Procurement Regulation § 1-18.803-3, is entitled, "Effect of termination for default," and provides:

"If a contractor's right to proceed is terminated for default, the Government may take over and complete the work or cause it to be completed, and the contractor and his sureties shall be liable to the Government for any increased costs caused thereby. If the contract contains the clause set forth in § 1-8.709-1, the contractor and his sureties shall, in addition to increased costs in completing the work, be liable for liquidated damages if liquidated damages are provided in the contract, or for actual damages if liquidated damages are not so provided."

We note that the contract *does* contain the clause set forth in § 1-8.709-1. We also point out that paragraph 5 of the Special Conditions of the contract reads as follows: "LIQUIDATED DAMAGES (See Sec. 27 of General Conditions) THE RATE OF LIQUIDATED DAMAGES for failure to complete the Work within the Time Specified will be ONE HUNDRED DOLLARS (\$100.00) PER DAY FOR EACH CALENDAR DAY OF DELAY."

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ESTATE OF HAROLD HUMPHY**7 IBIA 118**Decided *March 29, 1979*

Appeal from an order denying petition for rehearing after hearing upon reopening.

Reversed.

1. Indian Probate: Divorce: Indian Custom: Generally

A divorce in accordance with Indian or tribal custom has long been recognized by the Congress, the courts, and the Department.

2. Indian Probate: Divorce: Indian Custom: Generally

The courts have recognized Indian-custom divorces so long as the Indians continue in tribal relations.

3. Indian Probate: Divorce: Indian Custom: Generally

In recognizing the validity of Indian-custom divorces, no distinction is made in the kind of marriage which such divorce dissolves so long as the parties contracting the marriage and effecting the divorce are Indian wards of the Government and living in tribal relations.

4. Indian Probate: Divorce: Indian Custom: Generally

A divorce by Indian custom may be accomplished unilaterally by either of the parties to the marriage.

5. Indian Probate: Divorce: Indian Custom: Generally

The validity of Indian-custom divorce depends on whether the parties were living in tribal relations and whether it was an accepted and recognized custom of the tribe involved.

APPEARANCES: Jack H. Robison, Esq., of Johnson and Olson, for appellant, Ethelyn Murphy Humphy; Theodore J. Schroeder, Esq., of Sinai, Ohlson, Schroeder and Specchio, for appellee, Lorraine Kizer.

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

*INTERIOR BOARD OF
INDIAN APPEALS*

Ethelyn Murphy Humphy, hereinafter referred to as appellant, through her attorney, Jack H. Robison of Johnson and Olson, has appealed Administrative Law Judge William E. Hammett's order of July 5, 1978, denying petition for rehearing after hearing upon reopening.

Harold Humphy, hereinafter referred to as the decedent, an unallotted Shoshone Indian of the Duck Valley Indian Reservation of Nevada, died intestate near Fort Hall, Idaho, on Mar. 3, 1972, possessed of trust property situated in the State of Idaho.

Hearings were held on Oct. 5, 1972, and Apr. 29, 1975, at Fort Hall, Idaho, and Stewart, Nevada, for the purpose of ascertaining the heirs at law of the decedent. Thereafter, on June 30, 1975, an Order Determining Heirs was issued wherein Lorraine Kizer, the appellee herein, was determined to be the decedent's daughter and his sole heir. On June 18, 1976, this Board affirmed the said order thus making such determination final for the Department (5 IBIA 132).

On Nov. 18, 1976, the appellant, through her attorney, Callis A. Caldwell, filed a Petition to Reopen alleging she was the surviving spouse of the decedent. The petition was granted and the matter heard in Pocatello, Idaho, on Apr. 7, 1977. From the evidence adduced at the hearing of Apr. 7, 1977, the judge on Apr. 19, 1978, issued an order wherein he, among other things, found the marriage between the decedent and the appellant had been terminated by an Indian-custom divorce and that the decedent died unmarried. Accordingly, he affirmed his Order Determining Heirs of June 30, 1975.

The appellant on June 16, 1978, petitioned the judge for a rehearing stating as basis therefor:

1. The finding of the administrative law judge that Harold and Ethelyn Humpy were divorced by an Indian custom is improper. The Indian custom relied upon by the administrative law judge has not been shown to apply to the tribe of which this husband and wife were members, nor has it been shown that this custom applies to nonmember Indians living on the Fort Hall Indian Reservation.

2. That the administrative law judge failed to apply State law governing the divorce of a nonmember Indian couple on the Fort Hall Indian Reservation. The circumstances of this case indicate it must be determined what law is applicable to nonmember Indians living on the Fort Hall Reservation. The decision of the administrative law judge failed to take into consideration the *Code of Federal Regula-*

tions which the claimant asserts as the applicable law based upon review of the various sources of law which may apply.

The judge on July 5, 1978, denied the petition for the following reasons:

1. That Jack H. Robison, attorney for petitioner, was not an aggrieved party under 43 CFR 4.241 in that the petition did not have the signature of Ethelyn M. Humpy.

2. That the petition for rehearing did not raise any issues not raised by the evidence adduced at the hearing or in the posthearing brief filed by the petitioner.

Thereafter, on Sept. 1, 1978, the appellant filed a notice of appeal. It is the contention of the appellant that the administrative law judge's finding that Harold and Ethelyn Humpy were divorced by Indian custom is improper in that (1) the custom relied upon by the judge has not been shown to apply to the tribe of which this husband and wife were members nor (2) has it been shown that this custom applies to nonmember Indians living on the Fort Hall Indian Reservation.

Before addressing the appellant's contentions regarding her appeal, the matter of the appellee's motion to dismiss dated Oct. 6, 1978, requires consideration. The bases for the appellee's motion to dismiss are set forth as follows:

1. That the appellant, Ethelyn Humpy, was not, in fact, the real party in interest.

2. That appellant has not given her approval to the appeal in view of her whereabouts being unknown.

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3. That the appeal is merely an expression of harassment by previous appellants, or their relatives, or their attorney.

4. That the notice of appeal allegedly filed by the appellant on Sept. 1, 1978, is signed only by her attorney thereby indicating lack of approval thereof by the appellant.

The motion to dismiss must be and is hereby denied in view of the affidavit, dated Oct. 16, 1978, filed by appellant's attorney evidencing the fact that appellant approved and authorized the notice of appeal dated Sept. 1, 1978, and that she is, in fact, the real party in interest. In addition, 43 CFR 4.291 authorizes a notice of appeal to be signed by an attorney.

From a review of the record and briefs filed by the parties the only issue to be resolved is whether the marriage between the decedent and the appellant was terminated by an Indian-custom divorce.

[1] There appears to be no question that a divorce in accordance with Indian or tribal custom has long been recognized by the Congress, the courts, and the Department. See *Estate of Noah Bredell*, 53 I.D. 78 (Apr. 12, 1930), and cases cited therein.

[2] Regarding such divorces, the courts have held that so long as the Indians continue in tribal relations, their domestic affairs are controlled by their peculiar customs. *Bredell, supra*.

[3] In recognizing the validity of such divorces, no distinction is made in the kind of marriage which such

divorce dissolves so long as the parties contracting the marriage and effecting the divorce are Indian wards of the Government and living in tribal relations. *Bredell, supra*.

[4] Moreover, a divorce by Indian custom may be accomplished unilaterally by either of the parties to the marriage. *Estate of Hugh (William) Sloat*, IA-74 (Apr. 10, 1952).

[5] From the authorities hereinabove cited it is quite evident that the validity of Indian-custom divorce depends on whether the parties were living in tribal relations and whether it was an accepted and recognized custom of the tribe involved.

In the case at bar, the decedent, a Shoshone Indian of the Duck Valley Reservation, Nevada, purportedly married the appellant, a member of the Goshute Reservation, Utah, in 1951. The marriage, according to the record, was performed by a tribal judge of the Duck Valley Reservation in Owhyee, Nevada, in accordance with the Shoshone-Paiute Domestic Relations Code.¹ Subsequent thereto, the couple moved to the Fort Hall Reservation in the State

¹ Chapter 3—Domestic Relations, Sec. 2 *Marriage and Divorce*.

"All marriages shall be on authority of licenses, either tribal issued by the clerk of the Shoshone-Paiute Indian Court, or State issued by the County Clerk, and the ceremony shall be performed, in the case of a tribal license, by the Judge of the Shoshone-Paiute Indian Court, or in the case of a State license, by any person qualified by State law to perform such ceremonies, or in either case, by the Missionary."

of Idaho where they resided from 1952 until they separated in 1956.

The appellant's main contention, as we see it, is that Administrative Law Judge Hammett's finding that the decedent and the appellant were divorced by Indian custom was improper in that the custom relied upon by the judge has not been shown to apply to the tribe of which the parties were members.

The Shoshone-Paiute law and order code of the Duck Valley Reservation, Nevada, while setting forth how marriages are to be solemnized, makes no provision as to how marriages are to be terminated.² Moreover, a review of the record indicates the absence of evidence to substantiate an existing or recognized Indian custom regarding divorce on the Duck Valley Reservation. In fact, the evidence tends to indicate that divorce could only be effected through the courts. In the absence of a recognized Shoshone-Paiute tribal custom regarding divorce, it is rather difficult to support the judge's finding that the decedent's marriage to appellant had been terminated by an Indian-custom divorce. Presumably such finding may have been based on some theory of a universal Indian-custom divorce.

A review of *Bredell, supra*, and the authorities cited therein, indicates quite clearly that the validity and recognition of Indian- or tribal-custom divorces must be based on the custom and usage of each tribe involved. The right to

designate the customs that are to be given recognition in regulating matters that affect the internal and social relations rests with each tribe as an incident of its sovereignty. *U.S. v. Mazurie*, 419 U.S. 544 (1975).

In the absence of a finding of an accepted or recognized Indian custom regarding divorce among the Shoshone-Paiute tribes of the Duck Valley Reservation, we hold that the decedent's marriage to the appellant could not have been terminated by tribal or Indian custom. Accordingly, as the surviving spouse, appellant is entitled to share in the decedent's estate. The judge's decision to the contrary must be reversed.

Since we are in agreement with the appellant's main contention that the judge's finding of an Indian-custom divorce was improper, we see no necessity for considering appellant's other contentions regarding the applicability of Indian custom and usage to nonmember Indians living on the Fort Hall Reservation.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order confirming Order Determining Heirs after Reopening, dated Apr. 19, 1978, issued by William E. Hammett, is hereby reversed and the matter is remanded to Judge Hammett for the purpose of entering an appropriate order to carry out the dictates of the Board as set forth herein.

² See Footnote 1, *supra*.

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This decision is final for the Department.

ALEXANDER H. WILSON,
Chief Administrative Judge.

WE CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

WM. PHILIP HORTON,
Administrative Judge.

HENRY SAM LITTLEFIELD, JR.

7 IBIA 128

Decided March 30, 1979

Appeal from decision of Administrative Law Judge declaring that contestee was ineligible for enrollment under certain provisions of the Alaska Native Claims Settlement Act.

Reversed.

1. Alaska Native Claims Settlement Act: Disenrollment: Computation of Time for Filing and Service

Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document, the day upon which the decision or document to be appealed from or answered was served or the day of any other event after which the designated period of time begins to run is not to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day.

2. Alaska Native Claims Settlement Act: Enrollment: Metlakatla Natives

No person enrolled in the Metlakatla Indian Community of the Annette Islands Reserve as of Apr. 1, 1970, shall be eligible for enrollment under the Act.

3. Alaska Native Claims Settlement Act: Renunciation of Enrollment in Metlakatla Indian Community

The right of renunciation or expatriation is the natural and inherent right of the individual.

4. Alaska Native Claims Settlement Act: Renunciation of Enrollment in Metlakatla Indian Community

Any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses, although it has been said that such termination will not be inferred "from light and trifling circumstances."

APPEARANCES: Diane F. Thompson, Esq., Legal Services Program, Seattle Indian Center, Inc., Seattle, Washington, for appellants; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for appellee.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

The Enrollment Coordinator, Alaska Native Enrollment Office, Bureau of Indian Affairs, filed a complaint on Apr. 1, 1977, alleging that contestee Henry Sam Littlefield, Jr., was improperly enrolled under secs. 3, 5, and 19 of the Alaska Native Claims Settlement Act, Dec. 18, 1971, 85 Stat. 688 (43 U.S.C. § 1601 *et seq.* (1976)), and further that the contestee is enrolled as a

member of the Metlakatla Indian Community of Annette Islands Reserve.

The contestee applied for membership in the Metlakatla Indian Community on Aug. 9, 1958, and his application was accepted on Oct. 22, 1963. He married Carolyn Haldane on July 2, 1959, in Metlakatla, Alaska. They had two children. In October 1968, Carolyn Haldane Littlefield and the children left Metlakatla and went to live in Seattle, Washington. The contestee joined his family in Seattle in November 1968. The contestee lived with his family in Seattle from November 1968 to January 1970, then went to Los Angeles, California, where he stayed for 8 or 9 months. From Los Angeles the contestee went to Sitka, Alaska, where he stayed for approximately 1 year and thence returned to Seattle, Washington, where he remained until sometime after Thanksgiving 1972. The contestee returned to Metlakatla on or about December 1972 to visit his parents. He died at the Ketchikan General Hospital, Ketchikan, Alaska, on Jan. 5, 1973. Prior to his death and on May 10, 1972, Mr. Littlefield (contestee) applied for enrollment as an Alaskan Native and was subsequently enrolled.

On Apr. 4, 1977, the Enrollment Coordinator, Alaska Native Enrollment Office, Bureau of Indian Affairs, Anchorage, Alaska, filed a complaint with the Office of Hearings and Appeals, alleging in substance the contestee was not eligible for enrollment under secs. 3, 5, and

19 of the Alaska Native Claims Settlement Act, *supra*, because he was an enrolled member of the Metlakatla Indian community on Apr. 1, 1970. The matter was referred to Administrative Law Judge E. Kendall Clarke at Sacramento, California, for hearing.

After the hearing held on Nov. 29, 1977, Administrative Law Judge E. Kendall Clarke found on Sept. 8, 1978, that the contestee was enrolled in the Metlakatla Indian Community as of Apr. 1, 1970; that his continued absence did not result in the termination of his membership in said community until Nov. 1, 1970; and that therefore he was enrolled in the Metlakatla Indian Community as of Apr. 1, 1970. Judge Clarke concluded that the contestee was not eligible for enrollment under secs. 3, 5, and 19 of the Alaska Native Claims Settlement Act.

An appeal was filed on Oct. 10, 1978, with the Director, Office of Hearings and Appeals. Under authority of 43 CFR 4.1010 and 43 CFR 4.704, the Director ordered the Board of Indian Appeals to decide this case on an ad hoc basis.

The appellant contestee alleges that:

(1) The enrollment coordinator did not meet its burden of proof of showing that contestee was ever a member of the Metlakatla Indian Community.

(2) The administrative law judge was in error in concluding that contestee was a member of the Metlakatla Indian Community on Apr. 1, 1970.

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(3) Even if the contestee had been a member of the Metlakatla Indian Community on Apr. 1, 1970, he was entitled to enrollment under the Alaska Native Claims Settlement Act if he was not a member of the Metlakatla Community on Dec. 18, 1971, the date on which the Act was passed by Congress.

(4) The administrative law judge was incorrect in concluding that membership in the Metlakatla Community on an alleged ineligible date subjects an individual automatically to disenrollment proceedings.

The appellee, enrollment coordinator alleges:

(1) The appeal was not timely filed.

(2) The appellant (contestee) was ineligible under the Alaska Native Claims Settlement Act because he was an enrolled member of the Metlakatla Indian Community on Apr. 1, 1970.

[1] Sec. 4.22(e) of Title 43 of the *Code of Federal Regulations* provides that:

Computation of time for filing and service. Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document, the day upon which the decision or document to be appealed from or answered was served or the day of any other event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day * * *.

The record shows that Judge Clarke rendered his decision on Sept. 8, 1978, and that the appeal was received on Oct. 10, 1978.

Ordinarily Oct. 9, 1978, would have constituted the cutoff date for filing under Departmental regulations. However, October 9 was a Federal legal holiday (Columbus Day celebrated) making the end of the next day Oct. 10, 1978, the next business day, the cutoff date for filing an appeal.

We, therefore, find the appeal to have been timely filed.

Remaining is the issue of whether or not the contestee is entitled to enrollment under the Alaska Native Claims Settlement Act.

[2] At the outset we hold that membership in the Metlakatla Indian Community on Apr. 1, 1970, presents a bar to enrollment under the Alaska Native Claims Settlement Act. See P.L. 92-203, approved Dec. 18, 1971, sec. 5(b); 25 CFR 43h.11 (41 FR 32423 Aug. 3, 1976); *U.S. v. James Edward Scott & Robert Charles Scott*, Docket No. AL 77-135 D and AL 77-136-D, decided Dec. 4, 1978.

The Metlakatla Indian Community Constitution and By-Laws which was approved Aug. 23, 1944, provides in sec. 6, page 2, that "Continuous absence from Annette Islands Reserve for two years or longer, unless the member so absent shall notify the Council in writing, within such two year period, of his intention to return, shall constitute forfeiture of membership in the

Community. Such person may be readmitted to membership in the Community, as provided in Section 4 of this Article."

Were we to conclude that forfeiture is the only way to terminate a tribal relationship, the Board would be constrained to find the contestee ineligible for enrollment under the Alaska Native Claims Settlement Act since he was not absent from Metlakatla for a period of 2 years on Apr. 1, 1970.

[3, 4] However, forfeiture is not the only way that a tribal relationship may be terminated. As noted by the eminent Indian law scholar, Felix S. Cohen, an Indian may terminate a tribal relationship through renunciation of membership or expatriation.¹ Mr. Cohen states:

It is of course recognized throughout the cases that tribal membership is a bilateral relation, depending for its existence not only upon the action of the tribe but

¹ Cohen defines expatriation in Indian law as "the giving up of membership in a tribe." Handbook of Federal Indian Law at p. 177, n. 356. Historically, Cohen notes that the term was associated with the flight of oppressed Indians from belligerent tribes. See Handbook at 177-178 citing the landmark Federal case of *United States ex rel. Standing Bear v. Crook*, 25 Fed. Cas. No. 14891 (c.c. Neb. 1879). In his concluding analysis, however, Cohen observes:

"The right of expatriation established by the Standing Bear case remains a significant human right, even where Indian tribes are moving in an organized way toward the ideal of freedom from Indian Bureau supervision. It would be remarkable if the development of Indian self-government failed to give rise to dissatisfied individuals and minority groups who considered their tribal status a misfortune. History shows that nations lose in strength when they seek to prevent such unwitting subjects from renouncing allegiance." At p. 178.

also upon the action of the individual concerned. Any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses, although it has been said that such termination will not be inferred "from light and trifling circumstances." Handbook of Federal Indian Law by F. Cohen at p. 135.

An Indian's right to withdraw from tribal membership was upheld in *Reed v. U.S. National Bank of Portland*, 213 F. Supp. 919 (D. Ore. 1963). See also 42 CJS Indians § 10 (1978 Supp. at p. 155).

In the case at bar, the facts point to the conclusion that the contestee left Metlakatla in November 1968 with the intent to make Seattle, Washington, his permanent place of abode and his actual home or domicile.²

The contestee's family left Metlakatla in October 1968 and moved to Seattle, Washington. One month later the contestee followed his family to Seattle. The family continued to remain in Seattle, Washington. In or about January 1970 the contestee went to Los Angeles where he remained for 8 or 9 months. From Los Angeles he went to Sitka, Alaska, where he stayed for approximately 1 year and returned to Seattle, Washington, where his family was still living, and remained in Seattle until shortly after Thanksgiving 1972.

² Sec. 43h.1(k) of Title 25, *Code of Federal Regulations* in part defines "permanent residence" as the place of domicile on Apr. 1, 1970, which is the location of the permanent place of abode intended by the applicant to be his actual home.

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when he decided to go back to Metlakatla to visit his parents. He died on Jan. 5, 1973, at the Ketchikan General Hospital, Ketchikan, Alaska. At the time of his death the contestee was still married to Carolyn Haldane Littlefield and she and the family still resided in Seattle, Washington. Prior to his death, the contestee on May 10, 1972, applied for enrollment as an Alaska Native and was subsequently enrolled.

Based on the foregoing and other facts of record in this case, we hold that the contestee renounced his membership in the Metlakatla Indian Community prior to Apr. 1, 1970.

NOW, THEREFORE, by virtue of the authority delegated to the Board and pursuant to 43 CFR 4.704, **IT IS HEREBY ORDERED** that the determination made by Administrative Law Judge E. Kendall Clarke, to the effect that the contestee is not eligible for enrollment under secs. 3, 5, and 19 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1601 *et seq.* (1976)) be, and the same is **REVERSED**.

IT IS FURTHER ORDERED and adjudged that the contestee Henry Sam Littlefield, Jr., is properly enrolled under the Alaska Native Claims Settlement Act and thus entitled to all benefits thereunder. The Bureau of Indian Affairs is directed, within 30 days of the issuance of this decision, to restore all

benefits to which the contestee and/or his heirs at law may be entitled. This decision is final for the Department.

MITCHELL J. SABAGH,
Administrative Judge.

WE CONCUR:

WM. PHILIP HORTON,
Administrative Judge.

ALEXANDER H. WILSON,
Chief Administrative Judge.

C & K COAL COMPANY

1 IBSMA 118

Decided March 30, 1979

Certification of an interlocutory ruling by Chief Administrative Law Judge Laurie K. Luoma (in Docket No. CH 9-11-P) dated Feb. 1, 1979, denying a motion to dismiss filed by the Office of Surface Mining Reclamation and Enforcement in a petition for review of a civil penalty proceeding under the provisions of the Surface Mining Control and Reclamation Act of 1977.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure

The filing of an application for review of a notice of violation does not suspend the running of the period within which a petition for review of a proposed assessment of a civil penalty must be filed.

APPEARANCES: Billy Jack Gregg, Esq., Office of the Field Solicitor (Charleston), Michael Kurman, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, all for Respondent (Movant on Certification) Office of Surface Mining Reclamation and Enforcement; Bruno A. Muscatello, Esq., of Brydon and Stepanian, Butler, PA, for Applicant C & K Coal Company.

**OPINION BY THE INTERIOR
BOARD OF SURFACE MIN-
ING AND RECLAMATION
APPEALS**

*Factual and Procedural
Background*

This case presents a question certified to the Board from a proceeding to review a proposed civil penalty assessment under the Surface Mining Control and Reclamation Act of 1977 (Act).¹ The petition was filed by C & K Coal Company (C & K) on Dec. 18, 1978, and the proposed assessment was for three notices of violation issued by the Office of Surface Mining Reclamation and Enforcement (OSM) to C & K on June 28, 1978. Earlier, on Nov. 17, 1978, Chief Administrative Law Judge Luoma (Judge) had issued a decision on C & K's appli-

cation for review of the notices of violation themselves in which he affirmed two of the notices entirely and the third in part. On Jan. 8, 1979, C & K delivered to the Office of Hearings and Appeals a check in the amount of the proposed assessment to be placed in escrow, purportedly in accord with the regulations (42 FR 62704 (Dec. 13, 1977) (to be codified in 30 CFR 723.18)).

OSM filed an answer to the application on January 17 and simultaneously filed a motion to dismiss. The basis of the motion was that as C & K had not requested a conference (under sec. 723.17 of the interim regulations, 42 FR 62703-4 (Dec. 13, 1977)), it had to file its petition for review of the proposed assessment within 30 days of receipt thereof or be barred from complaining (according to sec. 518(c) of the Act). Since December 18 (the date the petition was filed) was far more than 30 days beyond service of the proposed assessment (July 29), C & K was said to have lost any entitlement it had to request a hearing on the assessment. The untimeliness of the request was worsened, according to OSM's motion, by the fact of even later delivery of the assessment amount into escrow.

On February 1, the Judge denied the motion on the grounds that the request was filed timely since it was filed within 30 days of the issuance of his decision on the application for review (apparently concluding that the review proceeding suspended the 30-day filing requirement for review of the assessment).

¹ The regulation covering certification is found at sec. 4.1124 of the procedural regulations (43 FR 34390 (Aug. 3, 1978) (to be codified in 43 CFR 4.1124)). Petitions for review of civil penalties are covered by part 723 of the interim regulations (42 FR 62702 (Dec. 13, 1977) (to be codified in 30 CFR Part 723)). The statutory basis for the regulations covering review of a civil penalty assessment is sec. 518 of the Act (Act of Aug. 3, 1977, P.L. 95-87, 91 Stat. 445, 499).

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Regarding the time of filing the check, the Judge said that receipt of the check was merely a "procedural consideration" and that receipt of the check on January 8, "perfected" the pleading of December 18 (and apparently referred back to it) (Order of February 1, denying Motion to Dismiss).

OSM moved the Judge for certification of his ruling on February 27, and the Judge granted that motion on March 2. On March 6, the Board issued an order scheduling briefing for the two parties. Both filed an initial brief, but only C & K filed a reply brief. The Judge has scheduled a hearing on the petition for review of the proposed assessment for April 4.

Discussion

Our task is to search the applicable provisions of the interim regulations and Act. The governing regulation is sec. 723.18 (42 FR 62704 (Dec. 13, 1977)). It provides:

(a) Within 30 days from receipt of the proposed assessment, the permittee may request a hearing before the Office of Hearings and Appeals by filing a petition and tendering full payment of the proposed assessment to be held in escrow.

(b) The timely filing of a request for a conference under § 723.17 of this Part suspends the running of the 30-day period for requesting a hearing. The suspension shall continue until the completion of the conference, which shall be held within 60 days from the date of the request for the conference. The permittee shall have 15 days after completion of the conference or after any disapproval by the Director or his designee

under § 723.17(e), whichever occurs later, to request a public hearing.

(c) * * *

It is not necessary to consider the implications or ramifications of subparagraph (b) which provides for a suspension of the time specified in subparagraph (a). No request for the conference which triggers such a suspension was made by C & K.² Therefore, we are left with subparagraph (a)—not to construe, because its meaning is clear, but to determine whether there was compliance.³

Sec. 723.18 has two requirements which must be met for a hearing to be held on the amount of a proposed assessment:

(1) that the petition for a hearing be filed within 30 days from the receipt of the proposed assessment; and

(2) that full payment of the proposed assessment be tendered into escrow.

There is no authority for the proposition advanced by C & K that an application for review of a notice of violation itself suspends either of these requirements.

The record indicates that C & K failed both to petition for a hearing

² Sec. 723.17 of the interim regulations (42 FR 62703-4 (Dec. 13, 1977) (to be codified in 30 CFR 723.17)).

³ Even if this language were not clear in itself, sec. 513(c) of the Act, which this regulation implements, requires that the person contesting "the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account * * *. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."

within 30 days of its July 29 receipt of the proposed assessment (petition filed on Dec. 18, 1978) and to tender payment within that same 30-day period.⁴ In fact, C & K did not even pay its money into escrow within 30 days of the Judge's November 17 decision affirming the notices of violation (payment into escrow on Jan. 8, 1979). OSM has raised these failures before the Hearings Division and this Board. The Board cannot ignore them.

We are not unmindful of the economic difficulties that might occur as a result of the application of the principle enunciated here.⁵ How-

⁴ Whether or not "tender" is synonymous with actual payment, it requires more than an undisclosed intention to pay up at some indefinite time. See *Kerr v. United States*, 108 F. 2d 585 (App. D.C. 1939). All that C & K did within the time specified was to file an application for review of the violation under sec. 525 of the Act.

⁵ Any modification of a regulation or the statute lies with the Secretary and the Congress, not this Board. In that respect, whatever the reason, it is clear that Congress did not include sec. 518(c) of the Act by inadvertence or oversight. As originally introduced, the bill (H.R. 2) did not require the assessment be paid in order to preserve appeal

ever, the case as presented leaves no alternative. The Board finds the applicable law requires that the motion to dismiss filed by OSM on Jan. 17, 1979, should have been granted.

Therefore, the decision on the OSM Motion to Dismiss is reversed and the case is remanded to the Hearings Division for further action not inconsistent herewith.⁶

MELVIN J. MIRKIN,
Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

rights. Sec. 518(c), as it now reads, is an amendment by the House Committee on Interior and Insular Affairs. Some discussion of why it might have been done may be found in S. Rep. No. 95-128, 95th Cong., 1st Sess., 58-59 (1977).

⁶ The Board recognizes its holding appears dispositive of this matter. However, as the case came to us by way of certification of an interlocutory ruling, we are of the opinion that the best procedure is for us to remand to the Hearings Division for final, formal disposition.

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APPEAL OF STATE OF ALASKA

3 ANCAB 196

Decided April 11, 1979

Appeal of State of Alaska from Decision of the Bureau of Land Management AA-6701-B, AA-6701-D and A-050903.

Dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Where the State of Alaska has not selected lands within the lands in dispute in an appeal, the State cannot be found to claim a property interest in such lands, within the meaning of standing regulations in 43 CFR 4.902, by reason of a prior selection.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

The test of standing to appeal under 43 CFR 4.902 is not whether a person is an "aggrieved party," but whether a person "claims a property interest in land affected by a determination from which an appeal to ANCAB is allowed."

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

While a "property interest" sufficient to confer standing under 43 CFR 4.902 need not be a vested interest, it may not be completely speculative.

4. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Where the State's "interest" in a particular tract of land is based only on the

possibility of a decision, at some future time, to select such land in preference to other land under the Statehood Act, the State's "interest" is too speculative to constitute a "property interest" under 43 CFR 4.902.

APPEARANCES: James Reeves, Esq., and Shelley J. Higgins, Esq., Office of the Attorney General, on behalf of the State of Alaska; Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; A. Robert Hahn, Esq., and Stan Stanfill, Esq., on behalf of Seldovia Native Association, Inc.; Joyce E. Bamberger, Esq., on behalf of Cook Inlet Region, Inc.

OPINION BY
ALASKA NATIVE CLAIMS
APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, and Part 4, Subpart J (1975), hereby makes the following findings, conclusions and decision dismissing the appeal from the decision of the State Director, Bureau of Land Management, AA-6701-B, AA-6701-D, and A-050903.

PROCEDURAL
BACKGROUND

The State of Alaska appeals a decision of the Bureau of Land

Management (BLM) published Apr. 6, 1978, covering land selections under the Alaska Native Claims Settlement Act (43 U.S.C. §§ 1601-1624 (Supp. IV, 1974)) (hereinafter ANCSA) by Seldovia Native Association, Inc., (AA-6701-B and AA-6701-D and under the Alaska Statehood Act (72 Stat. 339 (1958)) (hereinafter Statehood Act) by the State of Alaska (A-050903).

BLM previously adjudicated the same land selections in a decision dated Oct. 6, 1975, on the State's selection A-050903, and in a second decision dated Oct. 9, 1975, on Seldovia's selections AA-6701-B and AA-6701-D. Both decisions were timely appealed to the Board. Docketed respectively as ANCAB VLS 75-14, and VLS 75-15, they were consolidated for decision and, after extensive briefing, were decided June 9, 1977. The issues involved the status, as valid existing rights under ANCSA, of third-party interests created by the State on lands tentatively approved for selection under the Statehood Act, and then approved for conveyance to Seldovia Native Association under ANCSA. Certain easement questions were also presented. The Board found that valid existing rights protected under ANCSA must be specifically identified in a BLM decision to convey lands, and that easements reserved in a decision to convey must be described with specificity as to use and location. The Board remanded both appeals to BLM for action consistent with the decision, including the

processing of easements according to a recently developed easement identification system.

On Apr. 6, 1978, BLM published new decisions reflecting their action on the remand. All lands covered by this April 1978 decision were previously included in the decisions of October 1975. BLM included in the 1978 decision a standard appeals paragraph stating that the decision could be appealed to the Board. The present appeal resulted, despite the fact that the State had previously appealed BLM's decision on the same land selections in VLS 75-14 and VLS 75-15. However, in the present appeal, the State challenges BLM's decision to convey on grounds not previously raised.

BLM's decision of Apr. 6, 1978, states:

A portion of the lands described are located within 2 miles from the boundary of the first-class city of Seldovia as it existed on December 18, 1971. Seldovia Native Association, Inc. is organized by the Natives of Seldovia, constituting the first-class city. Therefore, those lands within the 2-mile limit are considered available for conveyance to Seldovia Native Association, Inc. (See 43 CFR 2650.6(a)).

The State asserts that BLM erred in determining that lands within two miles of the boundary of the first-class city of Seldovia were available for conveyance to Seldovia Native Association, Inc. under ANCSA, because:

1. the regulatory exception in 43 CFR 2650.6(a) to § 22(1) of ANCSA is contrary to the statute and therefore invalid;

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2. even if valid, the regulatory exception was not properly invoked by BLM because BLM's decision to convey lacks an adequate finding of fact supporting use of the exception; and

3. BLM violated basic constitutional principles in invoking the exception in that it failed to give the State of Alaska notice and an opportunity to present evidence and argument on the issue of whether or not the exception should be invoked.

Sec. 22(1) of ANCSA provides:

Notwithstanding any provision of this Act, no Village or Regional Corporation shall select lands which are within two miles from the boundary, as it exists on the date of enactment of this Act, of any home rule or first class city (excluding boroughs) or which are within six miles from the boundary of Ketchikan.

The regulation challenged by the State provides, in 43 CFR 2650.6:

(a) Notwithstanding any other provisions of the act, no village or regional corporation may select lands which are within 2 miles from the boundary of any home rule or first-class city (excluding boroughs) as the boundaries existed and the cities were classified on December 18, 1971, or which are within 6 miles from the boundary of Ketchikan, except that a village corporation organized by Natives of a community which is itself a first class or home-rule city is not prohibited from making selections within 2 miles from the boundary of that first class or home-rule city, unless such selections fall within 2 miles from the boundary of another first class or home-rule city which is not itself a Native village or within 6 miles from the boundary of Ketchikan.

(b) Determination as to which cities were classified as home rule or first class as of December 18, 1971, and their bound-

aries as of that date will be made in accordance with the laws of the State of Alaska.

All parties have stipulated that the boundary of the City of Seldovia is undisputed, and is as depicted on a map filed by BLM entitled "Surveyed Township 8 South, Range 15 West of the Seward Meridian/Surveyed Township 8 South, Range 14 West of the Seward Meridian, Alaska." The parties have also agreed that the only lands within the 2-mile limit which are being conveyed to Seldovia Native Association by the BLM decision here appealed are described as follows:

Lots 1 and 2 of U.S. Survey 4752, situated on a spit on the northwest shore of Seldovia Bay.

Containing 7.72 acres.

T. 9 S., R. 15 W.

sec. 1, excluding lot 1, U.S. Survey 317, U.S. Survey 954, U.S. Survey 2869, and Native allotment AA-7233;

sec. 2, N $\frac{1}{2}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$;

sec. 11, E $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$;

sec. 12, NE $\frac{1}{4}$ (fractional), excluding U.S. Survey 958 and U.S. Survey 3632; NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$;

Containing approximately 1,370 acres.

The BLM decision to convey rejects a land selection of the State of Alaska, and rescinds tentative approval previously granted to the

State of Alaska, as to the following described lands only:

- T. 7 S., R. 12 W., Seward Meridian
 - Sec. 2, all;
 - Sec. 11, excluding U.S. Survey 1557 and lots 1 and 2 of Tract B of U.S. Survey 3362;
 - Sec. 13, all;
 - Sec. 16, all;
 - Sec. 17, all;
 - Sec. 19, all;
 - Sec. 20, all;
 - Sec. 21, all;
 - Sec. 22, excluding U.S. Survey 3606;
 - Sec. 23 to 28, inclusive, all;
 - Sec. 31 to 36, inclusive, all.
- Containing approximately 8,465 acres.

The decision then approves conveyance of the same lands to Seldovia Native Association. None of these lands, denied to the State and granted to Seldovia, are within the 2-mile limit; the lands effectively transferred from the State to Seldovia by this decision are entirely within T. 7 S., R. 12 W., Seward meridian, while the only lands within the 2-mile limit as stipulated by the parties are within T. 9 S., R. 15 W. and lots 1 and 2 of U.S. Survey 4752 which are in T. 8 S., R. 15 W.

STANDING OF APPELLANT

Regulations governing the standing of parties before the Board are contained in 43 CFR 4.902 (1977) which provides:

Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or

an agency of the Federal Government, may appeal as provided in this subpart. However, a regional corporation shall have the right of appeal in any case involving land selections.

The State appeals conveyance to Seldovia Native Association of lands within 2 miles from the boundary of the City of Seldovia. However, the State's appeal is not based on rejection of State land selections within this 2-mile limit, and the State has not in fact selected any lands within 2 miles of the City of Seldovia. Therefore, before reaching the substantive questions raised by this appeal, the Board must first decide whether or not the State has standing to appeal pursuant to the regulations contained in 43 CFR 4.902.

The parties were given the opportunity to brief this point, after a conference held Oct. 27, 1978. The memorandum of conference states:

The Board raised the point that the decisions appealed in AN CAB # VLS 78-42 arise from Seldovia Native Association's selection applications AA-6701-B & D and the State of Alaska's selection application A-050903.

It appears from the record that the lands within two miles of the City of Seldovia, granted to Seldovia Native Association in decisions based on AA-6701-B & D, are located within Townships 9 South, Range 14 West; 9 South, Range 15 West; 8 South, Range 14 West; and 8 South, Range 15 West, S.M., while the lands rejected in the State's application A-050903 are entirely within Township 7 South, Range 12 W., S.M. The State selection does not appear to be within two miles of the City of Seldovia. Therefore, the Board questions whether the State has standing to raise issues involving lands within the two-mile limit in this ap-

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peal since the State does not appear to claim a property interest in lands within the two-mile limit adjudicated in the decision being appealed.

The State responded that their Application A-050903 did not cover any lands within the 2-mile limit but contended they nevertheless had a property interest sufficient for standing, because under the Alaska Statehood Act, *supra*, the State might in the future select lands within two miles of the City of Seldovia.

In appeals from administrative findings on village eligibility, the Board ruled that the State had standing as a "party aggrieved," pursuant to 43 CFR 4.700 (1973), based on similar rights of future selection under the Statehood Act. This ruling was upheld by the courts and is now cited by the State. In 1975, sec. 4.700 was superseded by sec. 4.902 (40 FR 33172 (1975)), the regulation now in effect, which grants standing to "[a]ny party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed * * *."

The State argues that its right to select land, which made it a "party aggrieved" under 43 CFR 4.700, also makes it a party "who claims a property interest in land" under 43 CFR 4.902; in particular the State asserts their right, under § 6(a) of the Statehood Act, to select 400,000 acres of land adjacent to communities for prospective com-

munity and recreation purposes. Most of the State's entitlement under § 6(a) has not yet been selected. If land within two miles of the City of Seldovia pass to Seldovia Native Association, Inc., they will no longer be available for State selection.

Finally, since the State does have a property interest in selection A-050903, which was rejected by the decision here appealed, the State asserts standing under the express language of 43 CFR 4.902, even though the rejected State land selection is not within two miles from the City of Seldovia and is completely unrelated to an appeal grounded in allegations of BLM error in administering the 2-mile limit.

Seldovia responds that standing regulations in 43 CFR 4.700 are no longer applicable and this appeal is governed by regulations in sec. 4.902. Since Seldovia is a village certified by the Secretary of the Interior for benefits under ANCSA, the State has no right to select lands within two miles of Seldovia because such lands have been withdrawn under the provisions of § 11(a)(1); therefore the State is neither "an aggrieved party" under sec. 4.700 or a party "who claims a property interest in land" under sec. 4.902.

It is the position of BLM that the State must claim a property interest in land within 2 miles of the boundary of Seldovia in order to have standing. The State's reliance on

Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), is misplaced in that the issue before the court was the standing of the State as a "party aggrieved" under 43 CFR 4.700, not as a party claiming a "property interest" under 43 CFR 4.902. Sec. 4.902 confers automatic standing upon Federal agencies and regional corporations regardless of whether these entities claim a property interest in land affected by the decision appealed; if the Board adopts the State's position that its possible future land selection option under the Statehood Act constitutes a property interest, the State will also have automatic standing to appeal all land selection decisions, which exceed the clear language of the regulation.

DISCUSSION

The standing requirement in 43 CFR 4.902 focuses on an interest in land claimed by an appellant, and on the relationship between that interest and the "determination" being appealed. That "determination" may be a decision to convey to a Native corporation its entire entitlement of land, or it may be a finding contained in such a decision, which affects only a small part of the land approved for conveyance. It is the Board's policy to segregate lands involved in each appeal, releasing the remaining, unaffected lands from adjudication and allowing them to be conveyed without delay.

With the agreement of the State and Seldovia Native Association, approximately 1,370 acres of land

located in T. 9 S., R. 15 W., Seward meridian and 7.2 acres of land located in T. 8 S., R. 14 W., Seward meridian, lots 1 and 2 of U.S. Survey 4752 have been so segregated from the remaining lands involved in the decision appealed.

The only determination here under appeal is that Seldovia Native Association was entitled to conveyance of lands located within two miles from the City of Seldovia. The lands segregated, described above, are clearly affected by that determination because they are located within that 2-mile limit.

[1] The Board now focuses on the nature of the interest claimed by the State of Alaska in such lands. The State's claim is not based on the State's selection of such lands nor the State's receipt of tentative approval for the selection of such lands under the Alaska Statehood Act, *supra*. The State has filed no land selections within the lands in dispute in this appeal. Therefore the State cannot be found to claim a property interest in such lands by reason of a prior selection.

The State asserts that their right under the Statehood Act to select lands throughout Alaska, constitutes a property interest in the disputed lands, within the meaning of 43 CFR 4.902.

[2] Regulations in 43 CFR 4.902, conferring standing on "any party who claims a property interest" were promulgated in August of 1975. The Board has since ruled that the appropriate test of standing to appeal is not whether a person is an "aggrieved party," but

whether a person "claims a property interest in land affected by a determination from which an appeal to ANCAB is allowed * * *." (*Appeal of Sam E. McDowell*, 2 ANCAB 350 (Mar. 28, 1978)).

The court's ruling in *Koniag, Inc. v. Andrus*, *supra*, is not controlling because it construed the earlier regulatory requirement that a party be "aggrieved" in order to have standing, rather than the present requirement of a "property interest."

Judge Bazelon, in his concurring opinion, emphasizes this point by comparing the two standards. After concluding that "* * * judicial and administrative standing are conceptually distinct * * *", in *Koniag, Inc. v. Andrus*, 580 F. 2d 601, 614 (D.C. Cir. 1978), he states:

The starting point in determining administrative standing should be the language of the statutes and regulations that provide for an administrative hearing, appeal or intervention. To be sure, these sources frequently provide no criteria for determining standing, or speak in vague terms of persons "aggrieved," "affected," or having an "interest"—in which case they are of little assistance. On occasion, however, the applicable statutes and regulations do supply specific criteria for determining standing, in which case they should of course be controlling.

An example of a regulation supplying relatively precise standards is 43 C.F.R. § 4.902 (1976), part of the new regulations on ANCSA hearing procedures promulgated after the hearings in the instant cases were completed. This section provides:

"Any party who claims a property interest in land affected by a determina-

tion from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart. However, a regional corporation shall have the right of appeal in any case involving land selections."

This regulation quite clearly establishes three classes of persons who have standing: those asserting a property interest in land, federal agencies, and regional corporations in land selection cases. It thus provides fairly objective criteria that can be applied without recourse to a more refined analysis.

[Footnotes omitted]

The question is whether the State's right, under the Statehood Act, to select lands within 2 miles from the boundary of the City of Seldovia, at some indefinite time in the future, if in fact the State decides to do so, constitutes a "property interest in land" as contemplated by 43 CFR 4.902.

The Board concludes that it does not.

In cases involving BIA decisions on village eligibility, appealed to the Board under the "party aggrieved" standing requirement, procedural regulations implied that the State had standing. The Court noted in *Koniag, Inc. v. Andrus*, 580 F. 2d 601, 608 (D.C. Cir. 1978):

The regulations provide that the BIA decisions are to be served on the village affected, all villages within the region, all regional corporations and the State of Alaska, 43 C.F.R. § 2651.2(a) (2), (4), (8). We interpret this requirement as evidence that the Secretary regarded these parties as potentially aggrieved if a village were wrongfully determined to be eligible or ineligible. We agree with the District Court that the interest of Alaska in these two cases is conjectural

at best but we emphasize we are not dealing with Article III considerations here; rather, the inquiry is whether the Secretary has violated his own regulations. In light of the broad reading which the Secretary has given the term "party aggrieved" we cannot say that permitting Alaska to appeal in the cases of Solomon and Alexander Creek was a plainly erroneous interpretation of the regulations.

Regulations requiring publication of BLM decisions on land selections do not require service of BLM decisions on the State in all cases, although service is required on the appropriate regional corporation and Federal agencies of record:

§ 2650.7 *Publication*

(d) For all land selections made under the act, in order to give actual notice of the decision of the Bureau of Land Management proposing to convey lands, the decision shall be served on all known parties of record who claim to have a property interest or other valid existing right in land affected by such decision, the appropriate regional corporation, and any Federal agency of record. * * *

These regulations do not imply that the State automatically claims a property interest in all selectable lands within the State, whether selection rights have been exercised or not.

To have standing to bring an appeal before this Board, an appellant other than a regional corporation or an agency of the Federal Government must make a claim of property interest in land affected by a determination appealable to this Board. (*Appeal of Lois A. Mayer*, 3 ANCAB 77 (Aug. 17, 1978)).

The term "property interest" is not defined in applicable regula-

tions and does not have a single precise meaning.

Not every interest in a particular object is necessarily a property interest, although such an interest may be a valuable right. Whether a claimed right can be considered a "property interest" depends on the nature of the right.

"Property" has been defined as "the right and interest which a man has in lands and chattels to the exclusion of others." (*Ralston Steel Car Co. v. Ralston*, 112 Ohio St 306, 147 N.E. 513, 516, 39 ALR 334 (1925)).

The common law concept of property is the right of any person to possess, use, enjoy and dispose of a thing. (*Willcox v. Penn Mut. L. Ins. Co.* 357 Pa. 581, 55 A. 2d 521, 174 ALR 220 (1947)).

It is well settled that a mining claim is a property right, which may not be declared invalid without due process of law. (*United States v. Keith V. O'Leary*, 63 I.D. 341 (1956); *Adams v. Witmer*, 271 F. 2d 29 (9th Cir. 1958)).

A soldier's additional homestead right is a property right and may be assigned (*Webster v. Luther*, 163 U.S. 331 (1896)). However, in order to be a "property right" the right to a soldier's additional homestead must be asserted in relation to lands properly classified as suitable for selection for this purpose; thus applicants for land selected under the soldier's additional homestead laws are not entitled to a hearing under the Administrative Procedure Act where the right of the applicant to select an additional entry

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is recognized, and the sole issue is whether the land selected can be properly classified as suitable for selection under the Act. (*Ferris F. Boothe*, 66 I.D. 395, 398 (1959)).

Similarly, the Department has frequently denied the right of a mining claimant to a hearing to determine the propriety of a withdrawal of land from mineral entry made prior to his first attempt to make a location on the withdrawn land. (*Dredge Corp.*, 65 I.D. 336, 338-339 (1958)).

A noncompetitive oil and gas lease is clearly a property interest. However, it has been held repeatedly that a mere offer for a noncompetitive oil and gas lease creates no property interest in the applicant. (*Arctic Slope/Western, Arctic Slope Eastern/Central*, ANCAB RLS 76-11(A)-(MM), ANCAB RLS 76-12(A)-(O), BLM F-19148, *et al.* (1976)).

The Board has ruled that mere assertion of a recreational use of a bank of a river by an appellant does not by itself constitute a claim of "property interest" as required by 43 CFR 4.902. (*Appeal of Sam E. McDowell, supra*, at 355.)

An assertion by an appellant that a village corporation might alter its selection pattern if an appeal of an entitlement determination is successful, is insufficient to show that an appellant's property interest in land is affected by a determination appealable to this Board as required by 43 CFR Part 4, Subpart J, Sec. 4.902, when the village corporation would be entitled to select the dis-

puted land regardless of the outcome of an appeal from the entitlement determination. (*Appeal of Omar Stratman*, 2 ANCAB 329 (Mar. 23, 1978).)

In *Appeal of State of Alaska*, 3 ANCAB 11, 85 I.D. 219 (1978), the State appealed a BLM decision to convey certain lands to a Native village corporation under ANCSA. The State asserted title to the disputed lands. Alternatively, the State claimed that the lands were not public lands available for conveyance under ANCSA because they were withdrawn for the benefit of the Alaska Railroad and no determination had been made under § 3(e) of ANCSA, establishing the smallest practicable tract needed by the railroad. The Board found that the State did not have title. As to the 3(e) issue, the Board found:

The final issue raised by the appellant in the original brief involved the failure of the Secretary to make a sec. 3(e) determination of the lands in issue prior to Eklutna's selection thereof. However, in the absence of any interest in the lands in issue the appellant has no standing to raise the necessity of a sec. 3(e) determination.

3 ANCAB 11, 19, 85 I.D. 219, 224-225.

Similarly, where the Secretary had found as a matter of law that a noncompetitive oil and gas lease offeror had no property interest in his offer, the Board found that an offeror for a noncompetitive oil and gas lease did not have standing under 43 CFR 4.902 to appeal either a BLM decision to reject his lease offer, or a BLM decision to issue a

conveyance to a Native corporation under ANCSA. (*Appeal of Jerry Roach*, 2 ANCAB 277 (Jan. 26, 1978.))

[3, 4] While a "property interest" sufficient to confer standing under sec. 4.902 need not be a vested interest, it may not be completely speculative. It is the Board's conclusion that where the State's "interest" in a particular tract of land is based only on the possibility of a decision, at some future time, to select such land in preference to other land under the Statehood Act, the State's "interest" is too speculative to constitute a "property interest" under 43 CFR 4.902.

Therefore, the Board concludes that the State lacks standing to bring this appeal, and the appeal is hereby dismissed.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
*Chairperson, Alaska Native
Claims Appeal Board.*

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

MILTON D. FEINBERG
BENSON J. LAMP
(On Reconsideration)

40 IBLA 222

Decided *April 11, 1979*

Reconsideration of Board decision, 37 IBLA 39, 85 I.D. 380 (1978), revers-

ing a decision of the New Mexico State Office, Bureau of Land Management, dismissing a protest against the award of any priority rights to the successful drawees of one simultaneous oil and gas lease drawing, and dismissing an appeal from a rejection of an oil and gas lease offer for failure to accompany the drawing entry card with the agency statement required by 43 CFR 3102.6-1. NM 29826.

Decision reaffirmed.

1. Administrative Authority: Generally — Administrative Practice — Bureau of Land Management—Oil and Gas Leases: Applications: Drawings

Established and longstanding Departmental policy relating to the administration of the simultaneous oil and gas leasing system, premised upon regulatory interpretation, is binding on all employees of the Bureau of Land Management, until such time as it is properly changed.

2. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Drawings

The essential requirement of the simultaneous oil and gas leasing system is that all properly filed offers be afforded equal opportunity to obtain a lease. Where a system effectively excludes a lease offer from consideration, such a system is arbitrary and capricious.

APPEARANCES: James W. McDade, Esq., McDade and Lee, Washington, D.C., for appellant Lamp; David H. Wiggs, Jr., Esq., and Darrell K. Windham, Esq., Kemp, Smith, White, Duncan & Hammond, El Paso, Texas, for appellant Feinberg; William R. Murray, Jr., Esq., Office of the Solicitor, for the Bureau of Land Management.

April 11, 1979

OPINION BY
ADMINISTRATIVE JUDGE
BURSKI

INTERIOR BOARD OF
LAND APPEALS

On Feb. 8, 1977, a drawing entry card (DEC), for one Benson J. Lamp was drawn with first priority for parcel No. NM 396 in the Bureau of Land Management (BLM), simultaneous oil and gas lease drawing in New Mexico. The offer was assigned serial number NM 29826. On Mar. 9, 1977, the New Mexico State Office, BLM, issued a decision requiring additional information as a prerequisite to the issuance of the oil and gas lease.

Certain entry cards, however, had been excluded from the original drawing, and another drawing had been held on Feb. 15, 1977, which included all of the entry cards. The offer of appellant Milton D. Feinberg was drawn with first priority at this new drawing. Under instructions from the BLM Director's Office, appellant Feinberg was given no priority inasmuch as his card had not been one of those originally excluded from the drawing. On Mar. 2, 1977, appellant Feinberg protested the issuance of the oil and gas lease to appellant Lamp, arguing that the results of the second drawing should control leasing priorities. On Apr. 6, 1977, the State Office dismissed Feinberg's protest.

On that same date, appellant Lamp submitted evidence in re-

sponse to the State Office decision of Mar. 9, 1977. By decision of Apr. 27, 1977, the State Office rejected Lamp's lease offer because the offer had not been accompanied by the statement required by 43 CFR 3102.6-1.

On May 7, 1977, appellant Feinberg filed a notice of appeal from the April 6 decision dismissing his protest. On May 12, appellant Lamp filed a notice of appeal from the April 27 decision of the State Office.

By decision of Sept. 18, 1978, 31 IBLA 39, 85 I.D. 380, this Board reversed the decision of the State Office rejecting appellant Feinberg's protest and dismissed the appeal of appellant Lamp. The Board's decision was premised on two discrete factors: (1) the procedures adopted by the Director, BLM, were contrary to longstanding *Departmental* policy and were thus a nullity; and (2) even assuming that the Director, BLM, was vested with the authority to change such policy, the drawing procedures adopted by the Director were arbitrary and capricious.

On Nov. 10, 1978, counsel for appellant Lamp requested that the Board reconsider its decision. Subsequently, the Office of the Solicitor filed an appearance on behalf of the Bureau of Land Management and similarly requested reconsideration of the Board's decision. By Order of Dec. 13, 1978, the Board granted the petition and afforded all parties a further opportunity to file briefs with the Board. Attor-

neys for appellant Feinberg thereupon filed a brief in support of the original decision. We have carefully considered the matters raised in the respective briefs, and while we feel that some elaboration and clarification of our original decision is necessary, we are nevertheless of the opinion that our earlier decision correctly decided the instant appeal. Accordingly, we reaffirm that decision for the reasons set out below.

Our decision of Sept. 18, 1978, was grounded on two separate bases. In order to fully analyze the arguments made on reconsideration we will examine these justifications seriatim.

[1] The first point of our original decision was that prior *Departmental* policy required that a new drawing be held to establish priorities where a drawing entry card had been omitted from the drawing. *Id.* at 42-43, 85 I.D. at 381-82. It having been established *Departmental* policy, the Board accordingly held that the Director, BLM, was without authority to change this policy.

Both appellant Lamp and the Solicitor attack this analysis for a number of reasons. Both admit that past practice required the holding of a new drawing to establish priorities where a drawing entry card had been omitted from the original drawing. Both argue, however, that this was not *Departmental* policy, but rather was merely a Bureau policy which was the subject of *Departmental* approbation, and was therefore amenable to change at the

Bureau level. As the brief for the Office of the Solicitor contends: "The redrawing procedures were a program decision, never codified in regulation, which received legal approval at the Departmental adjudication level." *Solicitor's Brief* at 6.

Appellant Lamp argues further that both the Federal Land Policy and Management Act of 1976, Act of Oct. 21, 1976, 90 Stat. 2744, 43 U.S.C. § 1701 *et seq.* (1976), and the Departmental Manual (*see* 235 DM 1.1A), provide the BLM Director with the authority to establish Departmental policy over matter within his jurisdiction. Additionally, appellant Lamp contends that the changes which the Director, BLM, sought to effectuate had been recommended by the Office of Audit and Investigation, and approved by the Assistant Secretary for Land and Water Resources.

As regards these last contentions, the Solicitor's Office expressly noted its disagreement with the position of appellant Lamp:

The Lamp petition suggests that the Director's action here is beyond the jurisdiction of the Board. The Lamp petition also argues that the Board cannot review procedures which are based on a report of the Office of Audit and Investigation (OAI). This would give such reports the status not only of legal determinations but also of Secretarial decisions. Such an interpretation is contrary to Departmental policy. All legal functions of the Department are delegated to the Office of the Solicitor, the Office of Hearings and Appeals and the Office of Congressional and Legislative Affairs. *See* Secretarial Order No. 3023. The alleged silent endorsement of the Assistant Secretary, Land and Water Re-

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sources, cannot elevate recommendations of OAI to the status of Secretarial decisions.

Solicitor's Brief at 5-6.

Initially, we wish to make it clear that we agree that not every decision in which this Board affirms actions of the BLM establishes *Departmental* policy. There are numerous areas in which BLM can properly select from a wide range of possible actions in attempting to carry out a desired policy. Affirmation by IBLA does not cement such a free policy choice into *Departmental* policy which can only be altered at the Departmental level. It merely represents appellate concurrence that the selected option was reasonable and not contrary to law or regulation.

On the other hand, when the appellate Boards of OHA interpret regulations, statutes and Departmental policies as requiring or prohibiting certain actions, such interpretation establishes *Departmental* policy which is fully binding upon the Bureau until such time as it is altered by competent authority.

The crucial line of demarcation relates to the extent to which the Board's decision is premised on interpretations of statutes, regulations, and Secretarial policy statements, as opposed to consideration of a range of policy *options*, any one of which might be permissible. Our original decision failed to explicate fully the original basis for the various decisions which held

that the omission of a DEC necessitate a new drawing in which all offers are included to establish priorities.

As such an analysis will show, the Department's policy has always been premised on the wording of the regulations relating to simultaneous drawings. Moreover, the applicable regulations have not been substantially altered since the original decisions.

In *Maw H. Christensen*, A-29703 (Sept. 17, 1963), the Assistant Solicitor noted an argument, pressed by the appellant therein, that under the mathematics of probability a successful offeror in a first drawing has less chance to be drawn first in the second drawing than do other offerors. He rejected this argument, noting: "As the Bureau has pointed out, regulations 43 CFR 192.43(e) and 295.8 expressly provide for a drawing to determine an applicant's priority and not a series of drawings. Thus the mathematics of probability cannot control this situation since *the result would be a drawing procedure contrary to the regulatory provisions.*" (Citations omitted; italics supplied.)

This position was restated in *Leonard H. Treiman*, A-29579 (October 4, 1963), wherein the Assistant Solicitor expressly declared: "There may be other methods of handling situations where offers are omitted from drawings but *in the absence of a change in the regulations* they may not be applied to

drawings held under the existing regulations." (Italics supplied.)

The regulation to which these two decisions refer was originally found at 43 CFR 295.8 (1963). The regulation provided, in relevant part:

"Unless otherwise provided in a particular order, or regulation, applications which are filed simultaneously will be processed in accordance with the following rules:

(a) All such applications received will be examined and appropriate action will be taken on those which do not conflict in whole or in part.

(b) All such applications which conflict in whole or in part will be included in a drawing which, except as provided in paragraph (c) of this section will fix the order in which the applications will be processed.

(1) Notwithstanding the provisions of paragraph (a) of this section, the priorities of all applications or offers to lease made and filed in accordance with the * * * [simultaneous procedures] of this chapter will be determined by public drawing whether or not they are in conflict.

(c) All applications included in the drawing will be subject to any priority to which any particular applicant may be entitled on account of a preference right conferred by law or regulations. [Italics supplied.]

While various changes and recodifications have occurred since 1963, the essential thrust of the regulation has remained unaltered. Thus, 43 CFR 1821.2-3(b) now provides:

Whenever it is necessary, for the purposes of the regulations in this chapter, to determine the order of priority of consideration among documents which have been simultaneously filed, such order of priority will be established by

a drawing open to public view. [Italics supplied.]

Thus, under well established precedent, the nature of the redrawing which occurs after the discovery of an omitted card cannot be changed absent remedial Departmental action.¹

As regards the contentions of appellant Lamp relating to the action, or nonaction, of the Assistant Secretary, we feel that these arguments were best answered in the portion of the Solicitor's Brief set forth *supra*.

The Solicitor's Brief points out that the past rulings of the Board holding that omission of a drawing entry card voids the drawing are contradicted by two cases which permitted a defective drawing to stand after the discovery of an omitted card. These two cases are *Esther Bosworth*, A-30903 (Apr. 1, 1968), and *John L. O'Brien*, A-30416 (Apr. 8, 1965). In the former case, the individual whose card had been erroneously excluded from the drawing had failed to appeal from the rejection of her offer, while in the latter case the applicant had

¹That such regulatory amendment was contemplated is made clear in the comments of BLM in response to the OAI report. After discussing various changes which BLM would seek to implement, the following statement appears: "We expect this change to require publication of amended regulations which cannot be accomplished in less than six months. In the meantime, however, we intend to instruct the State offices to make this change pending publication of the amended regulations."

Thus, while recognizing the necessity of amending the regulations, BLM nevertheless sought to effectuate the desired result without recourse to the proper procedure. This attempt we hold to be a nullity. See *Arizona Public Service Co.*, 20 IBLA 120 (1975).

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subsequently withdrawn his offer. In both instances the results of the original drawing were validated. The Solicitor therefore argues that a defective drawing is not *void* but merely *voidable*.

We need not decide this apparent conflict because even were we to assume that a defective drawing was merely *voidable* the position of BLM would not improve. As the decision in *Esther Bosworth, supra*, noted: "[I]t is only the omitted offeror's right to participate which would require the first drawing to be vacated. When he no longer has a right to demand a new drawing, there is no reason to vacate the old drawing and hold a new one." Thus, even if the old drawing is voidable, it is voidable at the option of the applicant whose cards have been omitted. In the instant case, no action of the applicant can be described as waiving his right to a new drawing. Indeed, a second drawing was held in this case. Thus, regardless of whether the first drawing is termed *void* or *voidable*, it is clear that subsequent actions *voided* the first drawing. Accordingly, we reaffirm our previous holding as herein explained.

[2] The second basis of our earlier decision was that the new method was arbitrary and capricious. Both appellant Lamp and the Solicitor attack this conclusion.²

² The Solicitor's Office also requests that, if we reaffirm our first holding we should vacate our second holding contending that it "is not an interpretation of a regulation but

Appellant Lamp points out that BLM intends in the future to use blanks in place of actual cards and thus the situation to which our original decision referred will not occur. The Solicitor's Office, for its part, concedes that the new system is not a perfect solution, but argues that it does represent "the maximum fairness to the most participants in the drawing."

It is decidedly not the province of this Board to substitute its judgment in matters of policy for the judgment of those to whom policy formulation is entrusted. At the same time, however, when this Board had determined that a policy achieves results that are arbitrary and capricious, it is the duty of the Board to delineate the area of our concern. Upon reexamination of this question, we remain firmly convinced that the new procedures are arbitrary and capricious.

In our earlier decision we hypothesized a situation in which the results of a first drawing were as follows: 1—Smith; 2—Jones; 3—Doe. We assumed that the DEC of Harris was later discovered to have been improperly omitted from the drawing. A new drawing was thereupon

a construction of the Secretary's authority to manage the oil and gas leasing program * * *. The Board has considered neither the merits nor deficiencies of alternate redrawing procedures as compared to either the old procedures or the new ones." Our earlier decision, however, was not premised on a weighing of possibilities but an affirmative finding that the specific procedure adopted by BLM was arbitrary and capricious. Thus, we decline to grant the Solicitor's Office request.

held in which the following priorities resulted: 1—Jones; 2—Harris; 3—Doe. We noted that under the procedures advocated in the instruction memorandum the final priorities would be: 1—Smith; 2—Harris; 3—Doe. This we held to be improper because the effect of the procedure was the essential exclusion of the DEC filed by Jones, who would have *no* priority even though his DEC was drawn second and first, respectively. We are unpersuaded by appellant Lamp or the Office of the Solicitor that this analysis is erroneous.

The basic predeterminate of the second drawing is an assumption that if the offer omitted in the first drawing had been included in that drawing it would have been drawn with the priority it attained in the second drawing. Applying this principle to the above hypothetical, when Harris is drawn second it is presumed that he would have been drawn second in the first drawing but for the fact that his card had been improperly omitted. However, if Harris had been drawn second in the original drawing it would still have been possible for the DEC of Jones to have been drawn third. This possibility is totally destroyed by the fact that Harris' DEC substitutes for, and thus cancels, that of Jones. These procedures are completely unfair as they relate to the opportunities of an individual whose DEC is replaced by a DEC which has been omitted from the original drawing since, for purposes of priority, it has virtually ceased to exist.

It is no answer to argue that the individual whose DEC is eliminated from priority is no worse off than one whose DEC was not drawn in the first place. In the latter situation it is the luck of the draw which has determined the result, but in the former case it is the affirmative application of a procedure in an inherently unfair fashion which has defeated an applicant's priority.

There may well be a number of procedures which adequately protect the rights of *all* participants in a simultaneous drawing. This, however, is not one of them.

As regards the contention of appellant Lamp that BLM will, in the future, use blank cards rather than the completed cards, it is sufficient to note that this possibility does not alter the essential unfairness of the procedure as described above, but operates merely to cloak it.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the original decision of the Board in the instant matter, reported at 37 IBLA 39, is reaffirmed.

JAMES L. BURSKI,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

EDWARD W. STUEBING,
Administrative Judge.

April 17, 1979

**DAYTON MINING COMPANY, INC.
AND PLATEAU, INC.**

1 IBSMA 125

Decided April 17, 1979

Appeal by the Office of Surface Mining Reclamation and Enforcement from a Mar. 8, 1979, decision by Administrative Law Judge David Torbett vacating the notice of violation and accompanying civil penalty in Docket Nos. NX-9-3-R and NX-9-14-P.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

The Secretary of the Interior has interpreted the Surface Mining Control and Reclamation Act of 1977 through his duly promulgated interim program regulations to exclude sec. 521(a)(1) of the Act from having effect during the interim regulatory program.

APPEARANCES: Michael W. Boehm, Esq., Gentry & Boehm, Chattanooga, Tennessee, for Dayton Mining Co., Inc. and Plateau, Inc.; John Philip Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee; Michael J. Kurman, Esq., and Marcus P. McGraw, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; L. Thomas Galloway, Esq., Richard L. Webb, Esq., of the Center for Law and Social Policy, Washington, D.C., for intervenors, Council of the Southern Mountains, Inc., The Environmental Policy Institute, The Appalachian Coalition, Virginia Citizens for Better

Reclamation, Save Our Cumberland Mountains, and National Wildlife Federation; David R. Wooley, Esq., of Appalachian Research and Defense Fund, Inc., Charleston, West Virginia, for intervenors, The Tug Valley Recovery Center, Inc., and Save Our Mountains.

**OPINION BY THE BOARD OF
SURFACE MINING AND
RECLAMATION APPEALS**

*Factual and Procedural
Background*

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from an administrative law judge's (ALJ's) decision dated Mar. 8, 1979, vacating a notice of violation and the accompanying civil penalty. The basis for the decision was the ALJ's conclusion that OSM had failed to comply with sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C.A. § 1271(a)(1) (West Supp. 1979), requiring notice to the state regulatory authority. The ALJ held that the 10-day notification period referred to in sec. 521(a)(1) is a condition precedent to the issuance of a notice of violation by OSM during the interim regulatory program.

On Sept. 13, 1978, Mine Area No. 5 of Dayton Mining Co., Inc., and Plateau, Inc. (Dayton), in Hamilton County, Tennessee, was inspected by OSM personnel. At the conclusion of the inspection OSM issued notice of violation No. 78-

II-6-5 to Dayton for four violations of the initial regulatory program performance standards. 42 FR 62680 (Dec. 13, 1977), 30 CFR Part 715. Dayton filed an application for review of the notice pursuant to sec. 525 of the Act, 30 U.S.C.A. § 1275 (West Supp. 1979). Subsequent to receiving a proposed assessment of a civil penalty for the violations, Dayton filed a petition for review of the civil penalty pursuant to sec. 518, 30 U.S.C.A. § 1268 (West Supp. 1979), of the Act. The two proceedings were consolidated for hearing, and following the hearing, the ALJ issued his decision on Mar. 8, 1979. OSM filed its notice of appeal on Mar. 16, 1979. On Mar. 20, 1979, certain groups (as listed in the appearances above) filed a petition for leave to intervene pursuant to 43 CFR 4.1110. By order dated Mar. 22, 1979, the Board granted the petition.

On Apr. 4, 1979, Dayton filed a motion to dismiss the appeal on the grounds that OSM failed to timely file its brief, and that OSM failed to remit the amount of the civil penalty (plus interest) as ordered by the ALJ. OSM filed a timely response on April 6.

Dayton's motion to dismiss is denied. Dayton has not established that it was prejudiced by OSM's filing. In addition, while the ALJ ordered that the civil penalty (plus interest) be remitted to Dayton, the general regulations relating to procedures and practice before the Office of Hearings and Appeals, of which this Board is a part, direct that the "timely filing of a notice of

appeal will suspend the effect of the decision appealed from pending the decision on appeal." 43 CFR 4.21 (a). Therefore, the ALJ's order to remit the civil penalty (plus interest) in this case is suspended pending the decision of this Board on this appeal.

Issue

The issue presented on appeal is whether sec. 521(a)(1) of the Act requires OSM during the initial regulatory program to notify the state regulatory authority at least 10 days prior to issuing a notice of violation.

Discussion

This Board looks first to the Secretary's regulations for guidance in disposing of appeals under the Act. In this particular case the applicable portion of the interim regulations, 42 FR 62701-2 (Dec. 13, 1977), 30 CFR Part 722—Enforcement Procedures, is silent as to any requirement of prior notice to the state regulatory authority. However, analysis of the regulations, as discussed below, reveals that such silence is not inconsistent with the Act, but is, in fact, compatible with the Secretary's determination, based upon the Act and the legislative history, that sec. 521(a)(1) does not apply during the interim regulatory program.

While we conclude that the ALJ was in error and we reverse his decision, we find it helpful to an understanding of our decision to set forth an overview of the inspection and enforcement provisions of the

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Act and regulations as they relate to the interim program.

In mandating the establishment of an interim regulatory program under secs. 501(a) and 502 of the Act, 30 U.S.C.A. §§ 1251(a), 1252 (West Supp. 1979), Congress directed the Secretary of the Interior to undertake a federal enforcement program to enforce the initial environmental performance standards pursuant to sec. 502(e) of the Act. Sec. 502(e) states in pertinent part:

Within six months after the date of enactment of this Act, the Secretary shall implement a Federal enforcement program which shall remain in effect in each State as surface coal mining operations are required to comply with the provisions of this Act, until the State program has been approved pursuant to this Act or until a Federal program has been implemented pursuant to this Act. The enforcement program shall—

(1) include inspections of surface coal mine sites which may be made (but at least one inspection for every site every six months), without advance notice to the mine operator and for the purpose of ascertaining compliance with the standards of subsections (b) and (c) above. The Secretary shall order any necessary enforcement action to be implemented pursuant to the Federal enforcement provision of this title to correct violations identified at the inspections;

(2) provide that upon receipt of inspection reports indicating that any surface coal mining operation has been found in violation of subsections (b) and (c) above, during not less than two consecutive State inspections or upon receipt by the Secretary of information which would give rise to reasonable belief that such standards are being violated by any surface coal mining operation, the Secretary

shall order the immediate inspection of such operation by Federal inspectors and the necessary enforcement actions, if any, to be implemented pursuant to the Federal enforcement provisions of this title. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection;

Sec. 502(e) was interpreted and implemented in 42 FR 62700 (Dec. 13, 1977) (now codified in 30 CFR 721.11) which reads as follows:

The authorized representative of the Secretary shall conduct inspections of surface coal mining and reclamation operations subject to regulation under the Act—

(a) On the basis of not less than two consecutive State inspection reports indicating a violation of the Act, regulations or permit conditions required by the Act;

(b) On the basis of information provided by a State or any person which gives rise to a reasonable belief that the provisions of the Act, regulations or permit conditions required by the Act are being violated, or that a condition or practice exists which creates an imminent danger to the health or safety of the public, or is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources; and

(c) On a random basis of at least one complete inspection each 6 months. A complete inspection is an onsite review of the operator's compliance with all applicable standards in these regulations within the entire area disturbed or affected by mining.

Therefore, sec. 721.11 of the regulations and sec. 502(e) of the Act delineate three types of federal in-

spections during the interim regulatory program—

1. routine inspections—sec. 502(e) (1) and 30 CFR 721.11(c);

2. inspections based upon state inspection reports—sec. 502(e) (2) and 30 CFR 721.11(a); and

3. inspections on the basis of information—sec. 502(e) (2) and 30 CFR 721.11(b).

Sec. 502(e) speaks of a federal enforcement program and it outlines federal inspections to take place during the interim program; however, it does not enumerate the types of enforcement actions which may be undertaken pursuant to such inspections. Sec. 502(e) (1) states that following routine federal inspections the Secretary "shall order any necessary enforcement action to be implemented pursuant to the Federal enforcement provision of this title * * *." Federal inspections arising pursuant to sec. 502(e) (2) require "necessary enforcement actions, if any, to be implemented pursuant to the Federal enforcement provisions of this title."

Enforcement, pursuant to interim regulatory Federal inspections, is, therefore, to take place in accordance with the "Federal enforcement provision" or the "Federal enforcement provisions" of the Act.

Sec. 521 of the Act is entitled the "enforcement" section. Sec. 521 and the enforcement procedures of the regulations, 42 FR 62701-2 (Dec. 13, 1977), 30 CFR Part 722, must be read to determine the enforcement actions which may be taken pursuant to such federal inspections dur-

ing the interim regulatory program.¹

In his analysis of the statutory provisions the ALJ immediately encountered a problem in attempting to interpret sec. 521(a) (1) and sec. 502(e) (1). He realized that the routine inspection requirement of sec. 502(e) (1) included the language "without advance notice to the mine operator * * *." The ALJ stated that "from a practical standpoint this provision would surely also mean without advance notice to the State." (ALJ's Decision at p. 3, fn. 1.) To avoid a conflict with the State notification provision in sec. 521(a) (1), he found that the 10-day notification period of that section did not relate to preinspection notice, but was, in fact, notice that was required prior to the issuance of a notice of violation.

¹ Sec. 521(a) (1) relates to federal inspections and the issuance of notice to a state regulatory authority. Sec. 521(a) (2) provides for the issuance of cessation orders for imminent dangers and harms "on the basis of any Federal inspection." Sec. 521(a) (3) provides for the issuance of notices of violation and orders of cessation for failure to abate "on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or * * * Federal inspection pursuant to section 502 * * *." Sec. 521(a) (4) concerns the suspension and revocation of permits "on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or * * * pursuant to section 502 * * *." Sec. 521(a) (5) concerns the contents and service of notices and orders. Sec. 521(b) relates to substituted federal enforcement of an approved state program. Sec. 521(c) concerns civil actions in U.S. District Courts for relief from noncompliance. Sec. 521(d) concerns the enforcement provisions which must be incorporated by a state for an approved state program.

Consequently, except for Sec. 521(a) (1), the language of the various provisions of Sec. 521 clearly discloses whether they are applicable to both the interim and permanent programs or only to the permanent program.

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In support of this conclusion the ALJ relied upon the language of sec. 521(a)(1) which states that: "[T]he Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring *unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation.*" (Italics added.) The ALJ stated that "[t]his wording clearly says that the ten-day notice requirement may come into play after a federal inspection." (ALJ's Decision at p. 3). While the ALJ evidently felt that his theory provided a consistent interpretation of these sections of the Act, further analysis reveals conflicts which he apparently did not consider.

Pursuant to sec. 502(e)(1) the Secretary "shall" order any necessary enforcement action in a routine inspection situation to be implemented under the federal enforcement provision. If a violation were found during such an inspection and the violation warranted the issuance of a notice of violation, the ALJ's interpretation of sec. 521(a)(1) would require that OSM give 10-day notice to the state and that OSM only take action if no State authority existed or the state failed to take appropriate action. The ALJ's interpretation, however, fails to reconcile the contrary mandate of sec. 521(a)(3) of the Act.² Pursuant to the congressional direc-

tion in sec. 521(a)(3), the Secretary's interim regulations require that "[i]f an authorized representative of the Secretary finds * * * violation which is not covered by sec. 722.11 [imminent dangers and harms] of this Part, the authorized representative shall issue a notice of violation fixing a reasonable time for abatement." 42 FR 62701 (Dec. 13, 1977), 30 CFR 722.12(a). This language requires the prompt issuance of a notice of violation and directly conflicts with any state notification prior to such issuance.³ In additions, the regulation governing service of notice of violation during the interim program, 42 FR 62701 (Dec. 13, 1977), 30 CFR 722.14, contemplates the service of notice at the time of the inspection.⁴

tion * * * pursuant to section 502, * * * the Secretary or his authorized representative determines that any permittee is in violation * * * the Secretary or authorized representative shall issue a notice [of violation] to the permittee * * *."

³ There is no question that the notification requirement of sec. 521(a)(1) does not apply to the issuance of cessation orders for imminent dangers or significant imminent environmental harms.

⁴ Support for immediate issuance of notices of violation is found in the legislative history of the Act. As stated in H.R. Rep. No. 218, 95th Cong., 1st Sess. 130 (1977):

"Where the Secretary is the regulatory authority or Federal inspection is being conducted pursuant to sections 502, 504(b) or subsection (b) of section 521, and a Federal inspector determines that a permittee is violating the act or his permit but that the violation is not causing imminent danger to the health or safety of the public or significant, imminent environmental harm, then the inspector *must issue a notice to the permittee setting a time within which to correct the violation.* * * *

"The enforcement mechanism of sec. 521(a)(3) will be utilized by the inspector in the great majority of compliance problems. It not

² The pertinent language of sec. 521(a)(3) reads as follows:

"When, on the basis of a Federal inspec-

(Continued)

[1] There is no indication in the interim regulations that the Secretary has interpreted sec. 521(a)(1) to be applicable during the interim regulatory program. In fact, the application of sec. 521(a)(1) during this period would be contrary to the interim regulatory scheme designed by the Secretary requiring federal inspections and prompt issuance of notices of violation. The Secretary has interpreted the Act through the interim regulations to exclude sec. 521(a)(1) from having effect during the interim regulatory program. The regulations are, in light of the foregoing discussion, clear and unambiguous on their face and the Board is bound by the Secretary's determination. See, *United Mine Workers of America v. Inland Steel Co.*, 6 IBMA 71, 83 I.D. 87 (1976); *Buffalo Mining Co.*, 2 IBMA 226, 80 I.D. 630, 636-7 (1973). Thus, the only plausible conclusion must be that sec. 521(a)(1) applies only to the permanent regulatory program and the fact that it does apply during that program is evidenced by a state notification provision being included in the permanent program regulations. 44 FR 15457 (1979) (to be codified in 30 CFR 842.11(b)(1)(ii)(B)).⁵

(Continued)

only enables the inspector to gain immediate control of the problem, but also provides him with essential flexibility to appropriately deal with minor as well as major violations." (Italics added.) See also S. Rep. No. 128, 95th Cong., 1st Sess. 91 (1977).

⁵ This conclusion allows effect to be given to both secs. 521(a)(1) and 521(a)(3). It is

Further support for the conclusion that sec. 521(a)(1) only applies in the permanent regulatory program may be found in the legislative history. Sec. 502(e)(2) of the 1977 House bill, H.R. 2, contained a provision requiring notification of the state regulatory authority prior to any federal inspection; however, this provision was deleted during the compromise reached on sec. 502. H.R. Rep. No. 493, 95th Cong., 1st Sess. 101 (1977).⁶ The compromise manifested congressional intent that no advance notification to the states of federal inspections is necessary during the interim regulatory program and, that the notice requirement of section 521(a)(1) refers to preinspection notice rather than notice

a fundamental rule of statutory construction that a statute be construed in a manner so as to give meaning to all of its terms. *Weinberger v. Hynson, Westcott, & Dunning, Inc.*, 412 U.S. 609, 633 (1973); 2A, C. D. Sands, *Sutherland Statutory Construction*, § 46.06 (4th ed. 1973).

⁶ It is clear that the House bill (H.R. 2) contemplated notice to the states prior to federal inspections both in the interim program under sec. 502(e)(2) and under the permanent program pursuant to sec. 521(a)(1). As stated in H.R. Rep. No. 218, 95th Cong., 1st Sess. 89 (1977), in discussing the major citizen participation provisions of H.R. 2:

"(a) During the interim program, upon receipt of any information which may be furnished by any person, and which gives rise to a reasonable belief that the interim standards are being violated, the Secretary is to order the immediate inspection of the alleged offending operation. The person who provides the Secretary with the information is to be notified as to the time of the inspection. Under the committee amendment, notice must be given to the State prior to such an inspection (sec. 502(f)) [sic, should be sec. 502(e)].

"(b) A provision similar to that described immediately above is operative after the interim period (sec. 521)." (Italics added.)

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prior to the issuance of a notice of violation.⁷

The Secretary's interpretation of the Act is consistent with the intent of Congress that the Federal Government maintain a strong oversight role during the interim program. *See* S. Rep. No. 128, 95th Cong., 1st Sess. 57 (1977). During the permanent phase of regulation the role of the Federal Government, however, will be minimized in states with approved state programs. H.R. Rep. No. 218, 95th Cong., 1st Sess. 129, 132 (1977). States with approved state programs will continue to regulate surface coal mining operations pursuant to enforcement provisions no less stringent than those in the federal enforce-

ment provisions. *See* secs. 503(a) and 521(d) of the Act. Therefore, consistent with a reduced federal role, sec. 521(a)(1) would only be operative during the permanent program and the states would have the first opportunity to take enforcement actions, except in the limited circumstances relating to imminent dangers and harms outlined in sec. 521(a)(1).

While the ALJ indicated that the state is the prime enforcer of the Act during both the interim program and under the federally approved permanent state program, his conclusion is not supported by the regulations, the Act, or the above-cited legislative history. Dayton has also argued that the states have primary responsibility for enforcement of the Act under the interim program. In support of that contention Dayton cited 42 FR 62678 (1977) (now codified in 30 CFR 710.4(b)) which reads in pertinent part: "The States are responsible for issuing permits and inspection and enforcement on lands on which operations are regulated by a State to insure compliance with the initial performance standards in Parts 715 through 718 of this chapter." Dayton overlooks, however, subsection (a) of sec. 710.4. Subsection (a) states that the Director, OSM, acting under the general direction of the Assistant Secretary, Energy and Minerals, is responsible for administering the initial regulatory program established by the Secretary. Subsections (a) and (b) of sec. 710.4, therefore,

⁷ The ALJ justified his conclusion that sec. 521(a)(1) notice meant notice prior to the issuance of a notice of violation rather than preinspection notice by citing the following language of sec. 521(a)(1):

"[T]he Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring *unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation.*" [Italics added.]

As pointed out, *supra*, while this interpretation resolved the conflict with the requirement of sec. 502(e)(1) that routine inspections be undertaken without advance notice, it did not address the problems of interpreting sec. 502(e)(2) in relation to sec. 521(a)(1). A much better explanation of the above-quoted language in sec. 521(a)(1) is that it was intended to refer to inspections undertaken pursuant to sec. 517 of the Act. Such inspections are to be made for the purpose of overseeing an approved state program during the permanent regulatory program. Information gathered during such an inspection would then provide the basis for notifying the state pursuant to sec. 521(a)(1). Failure to act on the part of the state or failure of the state to show good cause for such failure would trigger immediate federal inspection unless the information was a result of a previous inspection.

establish that there is a dual federal-state enforcement role during the interim regulatory program.⁸

Thus, it is clear that during the interim program Congress intended that the Federal Government take an active role in the enforcement of the interim program performance standards. Section 722.12(a) of the regulations expressly provides that the authorized representative of the Secretary "shall" issue a notice of violation upon the observance of a violation during an inspection undertaken pursuant to sec. 722.11 of the regulations. Sec. 722.11 of the regulations sets forth the types of inspections to be undertaken during the interim program. There is no mention of the 10-day state notification in the interim regulations. The legislative history establishes that state notification prior to inspection during the interim program was considered but was not adopted in the Act. All these factors compel the conclusion that sec. 521(a)(1) is not applicable during the interim regulatory program.

ORDER

The decision of the administrative law judge is, therefore, reversed and the case is remanded for further proceedings.

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

⁸ This concept of duality of enforcement during the interim regulatory program was evidenced by Congress in S. Rep. No. 128, 95th Cong., 1st Sess. 57 (1977).

ADMINISTRATIVE JUDGE MIRKIN CONCURRING:

As I am going to concur with the result of the majority, my concerns are more with matters of policy concerning the proper functions of this Board than with the ultimate decision. The majority has stated that the issue on appeal is "whether sec. 521(a)(1) of the Act requires OSM during the initial regulatory program to notify the state regulatory authority at least 10 days prior to issuing a notice of violation" (p. 242). It then, while observing that "[t]he regulations are * * * clear and unambiguous on their face * * *" (p. 246), proceeds to analyze and interpret the various statutes the regulations were enacted to implement along with the legislative history of those statutes. I believe the majority has done not only more than this Board is expected to do but more than it is entitled to do.

The issue on appeal is not what sec. 521(a)(1) of the Act requires, but what "the applicable law" requires.¹ If that applicable law re-

¹ Even this, though, is premature. The first task would properly be to determine whether or not Dayton has standing to interpose the 10-day prior notice failure as a defense to the alleged violation. As the majority does not mention it and the parties did not brief it, apparently only the ALJ and myself are concerned with the problem of permitting a statutory right that is granted in terms to a State to be extended to an individual. The ALJ, *sua sponte*, concluded that it was so extended and that Dayton could employ that defense (ALJ Decision, p. 6). I do not find the ALJ's reasoning convincing, but in the absence of briefing by the parties or a consideration of the problem by my colleagues, I would not care to pursue that avenue any further at this time.

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quires an embracing of the Act and its legislative provenance, all well and good. But that is something that must be established, not assumed. The applicable portion of the interim regulations is 30 CFR Part 722. It contains a number of time limitations.² There is no requirement, however, of any 10-day prior notice to a state regulatory authority.³ The regulations, as the majority says, clearly cover the activities with which we are concerned. And, OSM has apparently done everything that Part 722 requires it to do.

² Maximum 90 day abatement period. Sec. 722.12(d);

48-hour period within which to mail copies of notice and order. Sec. 722.14;

30-day period to conduct informal hearing. Sec. 722.15(a);

15 days within which to review order. Sec. 722.15(e);

30-day period in regard to formal review. Sec. 722.15(f);

12-month period concerning violations by same permittee. Sec. 722.16(c)(3).

³ The ALJ found that since sec. 722.1 states that Part 722 sets forth general procedures governing orders and notices under sec. 521 of the Act, that the 10-day period notice requirement of said sec. 521 should be read into Part 722, as its omission was due to oversight or misunderstanding of the law. That the Secretary was aware of statutory requirements, as he understood them in promulgating the interim regulations, is best evidenced by his statement in sec. 722.15(f) that the rights of a person to request formal review within 30 days under sec. 525(a)(1) of the Act shall not be affected by the interim regulations. There is no such reference to the 10-day prior notice provisions of sec. 521. The fairest conclusion to draw is that the Secretary, as he stated in the "Authority" provisions of Part 722, felt that he was declaring interim regulations pursuant to secs. 201, 501, and 502 of the Act. The Secretary's awareness of an obligation to apply the 10-day prior notice requirement of sec. 521 of the Act when the permanent program becomes applicable is best demonstrated by the express statement to that effect in the permanent regulations. 44 FR 15457 (1979) (to be codified as 30 CFR 842.11(b)(1)(ii)(B)).

Given the clarity of the regulations, no elaborate analysis of the Act or detailed account of the legislative history will serve a purpose other than erudition. This Board was created by the Secretary to review for him those matters properly brought before it. We are, in a sense, his voice on matters concerning the meaning of departmental policies dealing with those matters regulated by the Act. Although we have nothing to do with their promulgation, those policies are ordinarily declared by enactment of regulations.⁴ It is the function of this Board to explicate the declared will of the Secretary by reviewing his regulations. It is not normally our business to determine why Congress has done whatever it has done.⁵ It is not that congressional intent is unimportant. It is very important, but, where appropriate to inquire, it is for one of the Secretary's other agents, not us, to make the inquiry. We are his voice, not his mouthpiece.

There are exceptions to this operational standard of confinement to the regulations. When the Secretary has not made his will sufficiently clear in the regulations, we are free to employ all of the customary aids to construction—regulatory history,

⁴ Where the statute is self executing, we will look to it directly. Where an effective date of a regulation is specified in the statute, we will also go to it directly. This is only to illustrate, not limit, the ways in which departmental policy may be found beyond the regulations themselves.

⁵ See, *United Mine Workers of America v. Inland Steel Co.*, 6 IBMA 71, 83 I.D. 87 (1976); *Buffalo Mining Co.*, 2 IBMA 226, 80 I.D. 630, 636-7 (1973).

direct reference to the statutory base, legislative history, the Constitution and, indeed if necessary, invocation of the Great Charter itself. The purpose, though, is to ascertain the intention of the Secretary, not that of Congress, except insofar as it illuminates the intention of the Secretary. It should go without saying that it is assumed that the Secretary's intention will always be to comply with relevant statutes. Therefore, the exceptions to the general rule that we confine our interpretations to the regulations do not apply to this case.

By availing themselves of the Act and its history, rather than limiting themselves to the regulations, the majority is doing the very thing that led the ALJ into error. They differ from him only in their conclusions, not their methods. The implications of the majority's approach are best seen in their first paragraph under *Discussion* (p. 242), where they say that analysis of the regulations reveals no inconsistency with the Act but that, in fact, they were based upon the Act and the legislative history. In light of the unambiguousness of the regulations, what if their analysis had shown an inconsistency? Or that the regulations were not based upon the Act? Or that the regulations were not supported by the legislative history? * This Board is not a court of law; nor is it an independent review board, such as the Mine Safety and Health Review Commission or the National Labor Relations

Board. We are the creature of the one whose policies we review. That is not to say we are empowered or expected to act in an arbitrary manner. We are not. But we are also not empowered to pass on the wisdom of what we review. Nor are we authorized to act as an appellate court in reviewing what the Secretary has declared to be his policy. It is our task to explain it, not to justify its merits.

MELVIN J. MIRKIN,
Administrative Judge.

CEDAR COAL COMPANY

1 IBSMA 145

Decided April 20, 1979

Appeal by Office of Surface Mining Reclamation and Enforcement, from a Nov. 17, 1978 decision of Administrative Law Judge Allen, in Docket No. CH8-17-R, vacating a part of Notice of Violation No. 78-I-4-2, issued by the Office of Surface Mining Reclamation and Enforcement in accordance with sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, which indicated a violation of 30 CFR 715.14(b)(1)(iii) of the Department's interim regulations.

Reversed in part and modified in part.

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Performance Requirements: State Regulation

Compliance with State mining permit conditions does not excuse noncompliance

* See, Donald E. Jordan, 35 IBLA 290 (1978).

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with the initial Federal performance requirements.

2. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Previously-mined Lands

The backfilling and grading requirements of 30 CFR 715.14 apply only to lands which are used, disturbed, or redisturbed in connection with or to facilitate mining or to comply with the requirements of the Act or Federal interim regulations, and do not apply to previously-mined lands on which no adverse physical impact results from surface coal mining and reclamation operations conducted after the effective date of the Federal initial performance requirements.

APPEARANCES: David M. Cohen, Esq., of American Electric Power Service Corp., Lancaster, Ohio, for Cedar Coal Co.; Marye L. Wright, Esq., of the Office of the Field Solicitor, Charleston, West Virginia; and Shelley D. Hayes, Esq., Marcus P. McGraw, Esq., and William M. Eichbaum, Esq., of the Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Terence L. Thatcher, Esq., of Federal Wildlife Federation, Washington, D.C., for same; L. Thomas Galloway, Esq., and Richard L. Webb, Esq., of the Center for Law and Social Policy, Washington, D.C., for intervenors, Council of the Southern Mountains, The Environmental Policy Institute, and The Appalachian Coalition; and David R. Wooley, Esq., of Appalachian Research and Defense Fund, Inc., Charleston, West Virginia, for intervenors, The Tug Valley Recovery Center, Inc., and Save Our Mountains.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

An appeal has been filed with the Board by the Office of Surface Mining Reclamation and Enforcement (OSM) from an administrative law judge's decision vacating violation No. 3 of Notice of Violation No. 78-I-4-2, issued to Cedar Coal Co. (Cedar) on Aug. 25, 1978. In pertinent part, OSM cited a violation of 30 CFR 715.14(b)(1)(ii), 42 FR 62682 (Dec. 13, 1977) of the Department's interim regulations. The remedial action ordered by OSM was that Cedar backfill and grade, to the most moderate slope possible, to eliminate a horizontal section of orphaned highwall that is adjacent to its mine permit area.

There are two principal issues presented in this appeal. The first is whether conditions contained in Cedar's West Virginia mine permit affect the applicability of the initial regulatory program backfilling and grading requirements to Cedar's operation. The second issue is whether Cedar has disturbed an orphaned highwall¹ located adja-

¹ The term "highwall" is defined in 30 CFR 710.5, 42 FR 62678 (Dec. 13, 1977) of the interim regulations to mean "the face of exposed overburden and coal in an open cut of a surface or for entry to an underground coal mine." The term "orphaned highwall" is not defined in the interim regulations or Act. As used in this opinion and in the proceedings below, this term means a highwall which remains from mining operations conducted prior to those of Cedar Coal Co.

cent to its permitted area so as to be required to eliminate completely any portion thereof in accordance with sec. 715.14 of the Department's interim regulations.

The administrative law judge held that Cedar's state mining permit amounts to a "variance or modification of recovery plans for unmined property," and that Cedar "shall continue to reclaim the highwall in accordance with the permit granted by the State of West Virginia" (Decision rendered Nov. 17, 1978, Docket No. CH8-17-R, at 7). The judge also ruled that Cedar had not disturbed the subject orphaned highwall in such a way as to violate the performance requirements of sec. 715.14. We hold that Cedar's mine permit cannot serve to relieve the company of its performance obligations under sec. 715.14. Moreover, while we agree with the judge that Cedar has not violated the performance requirements of sec. 715.14, we do so only on the basis of the reasons set forth in this opinion. Our decision, therefore, is to reverse in part and modify in part that of the administrative law judge.

Facts and Procedural Background

Cedar Coal Co., a West Virginia corp., conducts a surface coal mining operation under the authority of Permit No. 197-77, issued by the Division of Reclamation, West Virginia Department of Natural Resources, on Nov. 29, 1977 (Cedar's Exhibit D). Cedar's permitted area is bordered, on one side, by an or-

phaned highwall of 30 to 70 feet in height (Tr. 10, 25) which is the result of a previous contour strip mining operation (Tr. 51). Cedar has excavated the overburden² at the base of this orphaned highwall to facilitate its extraction of coal from an underlying seam. This activity has resulted in new highwall exposures, some of which have been downward extensions of the orphaned highwall (in that Cedar's excavation has been, in part, flush with the plane of the orphaned highwall), and some of which have been located at a distance (ranging to 10 feet) away from the orphaned highwall (Tr. 40, 56-9). Cedar has used all available spoil to eliminate these new highwall exposures and as much as possible of the orphaned highwall (Tr. 35, 44-5, 56). According to the terms of Cedar's state mining permit, the company is required to reduce the orphaned highwall only so much as is practical with available materials (Cedar's Exhibit D).

Two OSM inspectors visited Cedar's permit area on Aug. 25, 1978, and, on the basis of their inspection of Cedar's operation, Notice of Violation No. 78-I-4-2 was issued. Five violations of the Department's interim regulations were indicated therein. In violation No. 3 of this notice the OSM inspector noted Cedar's failure to eliminate completely the orphaned high-

² The term "overburden" is defined in 30 CFR 710.5, 42 FR 62678 (Dec. 13, 1977) of the interim regulations to mean "material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil."

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wall as a violation of sec. 715.14(b) (1) (ii). The remedial action required of Cedar was that it "[b]ackfill and grade to the most moderate slope possible to eliminate the highwall which does not exceed the angle of repose or such lesser [*sic*] slopes as is necessary to assure stability." The time set for abatement of violation No. 3 was Oct. 25, 1978.

On Sept. 25, 1978, Cedar filed an application for review of violation No. 3 pursuant to sec. 525(a) (1) of the Surface Mining Control and Reclamation Act of 1977 (Act), 91 Stat. 445, 511, 30 U.S.C.A. § 1275 (a) (1) (West Supp. 1979). A hearing was set for October 31. After receipt of notice of this hearing date, Cedar applied for temporary relief (pursuant to 43 CFR 4.1260, 43 FR 34397 (Aug. 3, 1978) and requested that a hearing on this matter be conducted prior to Oct. 25, 1978. OSM did not object to this request and a hearing was conducted on October 23, at the conclusion of which the administrative law judge granted temporary relief to Cedar for a period of 90 days from October 25 (Order issued Oct. 23, 1978, Docket No. CH8-17-R).³ Upon agreement of the parties (Tr. 73), no further hearing was held and the issues in the case were submitted to the administrative law judge on briefs and proposed findings of fact and conclusions of law.

³ OSM appealed this order to the Board and, on Jan. 5, 1979, the Board dismissed this appeal. 1 IBSMA 83 (1979).

On Nov. 17, 1978, the administrative law judge issued a written decision vacating and dismissing violation No. 3. OSM filed its notice of appeal with this Board on December 13 (in accordance with 43 CFR 4.1271, 43 FR 34398 (Aug. 3, 1978)). On Jan. 18, 1979, the Board granted a petition for leave to intervene.⁴ All parties filed briefs with the Board.

Discussion

In its notice of violation OSM cited Cedar for violating sec. 715.14 (b) (1) (ii) of the interim regulations. The pertinent language of that regulation is:

The requirements of this paragraph may be modified by the regulatory authority where the mining is re-affecting previously mined lands that have not been restored to the standards of this section and sufficient spoil is not available to return to the slope determined according to paragraph (a) (1). Where such modifications are approved, the permittee shall, as a minimum, be required to—

* * * * *

(ii) Backfill and grade to the most moderate slope possible to eliminate the highwall which does not exceed the angle of repose or such lesser slopes as is necessary to assure stability.

30 CFR 715.14(b) (1) (ii), 42 FR 62682 (Dec. 13, 1977). From the record before us it is clear that Cedar did not seek, prior to OSM's

⁴ This petition was filed by the National Wildlife Federation, Council of the Southern Mountains, Inc., The Environmental Policy Institute, The Appalachian Coalition, The Tug Valley Recovery Center, and Save Our Mountains.

issuance of the notice of violation, a modification of its performance obligations under sec. 715.14(b).⁵ Thus, we find that OSM inaccurately cited sec. 715.14(b)(1)(ii) as the basis for the action ordered to remedy violation No. 3 of Notice of Violation No. 78-I-4-2. Cedar has not raised this point, and it is clear from the record that this error has not prejudiced Cedar by distracting that party from the issue of whether it has disturbed the orphaned highwall so as to be required to eliminate, completely, any portion thereof in accordance with sec. 715.14. For these reasons, and because we have determined that Cedar's mining activities (as of the date on which OSM issued its notice of violation), had not made the company responsible for the complete elimination of any portion of the orphaned highwall, we find OSM's error to have been harmless in this instance.

[1] The administrative law judge determined that "Cedar shall continue to reclaim the highwall in accordance with the permit granted by the State of West Virginia, and

⁵ OSM's notice of violation to Cedar could not operate as an approval of a modification of the general performance standards in sec. 715.14, because the "regulatory authority" referenced in sec. 715.14(b) is "the department or agency in [West Virginia] * * * which has primary responsibility at the State level for administering the Act in the initial program * * *." 30 CFR 700.5, 42 FR 62676 (Dec. 13, 1977). Cedar's mine permit does not evidence state authorization of such a modification, because it contains no provision for the complete elimination of any portion of the orphaned highwall (*see* Cedar's Exhibit D) and, under the terms of sec. 715.14(b)(1), that is required, at a minimum, for those portions of an orphaned highwall that a permittee disturbs in the course of its mining operation.

* * * that such a permit and plan amount to a variance or modification of recovery plans for unmined property" (Decision issued on Nov. 17, 1978, Docket No. CH8-17-R, at 7). This ruling presumably was intended to be responsive to Cedar's argument that it is not subject to the performance requirements of sec. 715.14 because it conducts its operation under the authority of a state mine permit issued prior to the effective date of the Department's interim regulations (Cedar's Application for Temporary Relief filed Oct. 20, 1978). With this argument, and the judge's ruling thereon, we must disagree.

Sec. 502(c) of the Act provides, in pertinent part:

On and after nine months from the date of enactment of this Act, all surface coal mining operations on lands on which such operations are regulated by a State shall comply with the provisions of subsections 515(b)(2), 515(b)(3), 515(b)(5), 515(b)(10), 515(b)(13), 515(b)(15), 515(b)(19), and 515(d) of this Act * * *.

30 U.S.C.A. § 1252(c) (West Supp. 1979).⁶ Cedar's operation is a "surface coal mining operation" (*see* definition at 30 U.S.C.A. § 1291(28) (West Supp. 1979)) which is located on state land and is regulated by the State of West Virginia. The fact that Cedar's state mine permit does not contain a reference to the grading and backfilling requirements of the Act or interim regula-

⁶ Certain surface coal mining operations were required to comply with the initial performance standards on and after 6 months from the date of enactment of the Act, 30 U.S.C.A. § 1252(b) (West Supp. 1979); *see generally* 30 CFR 710.11, 42 FR 62679 (Dec. 13, 1977).

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tions does not change Cedar's obligations under federal law; compliance with a state permit condition does not excuse noncompliance with the interim regulations.⁷

[2] While we agree with OSM that Cedar's operation is subject to the performance requirements of the interim regulations, we do not accept OSM's argument that Cedar has "disturbed" the orphaned highwall, within the meaning of sec. 710.11(d)(1), and is therefore responsible for that highwall's complete elimination.⁸ In this regard,

⁷ Sec. 720.11 of the interim regulations provides that "[n]othing in the Act or these regulations shall be interpreted to preclude a State from exercising its authority to enforce State law, regulations, and permit conditions, *unless compliance with the State law, regulations, or permit condition will preclude compliance with these regulations.*" (Italics added.) 30 CFR 720.11, 42 FR 62700 (Dec. 13, 1977). See also 30 U.S.C.A. § 1255 (West Supp. 1979); S. Rep. No. 128, 95th Cong., 1st Sess. 57 (1977):

"Since practically all surface coal mining operations covered by the initial regulatory procedure are presently regulated by existing State regulatory authorities (the major exception being operations on federal and Indian lands), it is not the purpose of this interim federal enforcement program to place the Secretary of the Interior in the business of issuing mining permits for operations on lands within the jurisdiction of the States. *The bill imposes a duty upon the States to review and revise existing permits to insure compliance with the interim standards of sec. 402 [sec. 502 of the Act], and obliges the States to issue new permits in accordance with those standards.* It is the view of the Committee, however, that the Secretary would be required to assure States' performance of these duties and obligations, pursuant to the federal inspection and enforcement provisions of sec. 402(e)." (Italics added.)

⁸ Sec. 710.11(d)(1) provides:

"The requirements of this chapter apply to operations conducted after the effective date of these regulations on lands from which the coal has not yet been removed *and to any other lands used, disturbed, or redisturbed in connection with or to facilitate mining or to*

we are concerned only with the impact of Cedar's mining operation on a 1,500-foot horizontal section of the orphaned highwall. This is the extent of the orphaned highwall along which Cedar conducted mining operations between May 3, 1978 (the date on which the initial federal performance requirements became applicable to Cedar's operation), and Aug. 25, 1978 (the date on which OSM issued the subject notice of violation).

OSM acknowledges that there is no definition of the term "disturbed" specified in the Act or interim regulations, but notes that the phrase "disturbed area" is defined in sec. 710.5 to mean "those lands that have been affected by surface coal mining and reclamation operations." 30 CFR 710.5, 42 FR 62678 (Dec. 13, 1977). On the basis of this definition, OSM argues that the terms "disturbed" and "affected" are synonymous, and that since Cedar "affected" the orphaned highwall by "touching" it, the company must eliminate the entire highwall (OSM's Brief, at 14).

In the course of its mining operations, Cedar has removed overburden from the base of the orphaned highwall. This activity has resulted in *new* highwall exposures, part of which have been on the same plane as the orphaned highwall and part of which have been located at distances ranging to 10 feet from the orphaned highwall. There has

comply with the requirements of the Act or these regulations." (Italics added.) 30 CFR 710.11(d)(1), 42 FR 62679 (Dec. 13, 1977).

been no showing that Cedar's removal of overburden has resulted in any adverse physical impact on the orphaned highwall. Thus, we conclude that this activity has not triggered any obligation on the part of Cedar to eliminate the orphaned highwall.⁹

The only effect on the orphaned highwall that has been shown to have resulted from Cedar's mining operation is that the highwall has been covered partially by the excess spoil material backfilled against it by Cedar. This is an incidental result of Cedar's reclamation of its excavations, which reclamation has not been shown, in itself, to be in violation of the performance standards of sec. 715.14. Moreover, as there is no basis in the record for a finding that the partial covering of the orphaned highwall has caused any adverse physical impact on the remaining exposed portions of that highwall such as to satisfy our interpretation of secs. 715.14 and 710.11(d)(1), we must conclude that Cedar is not required to eliminate completely any portion thereof. A contrary holding on our part would discourage coal mining companies from performing reclamation activity that results in an improvement in the preexisting environmental condition of the area in which it op-

erates when, as in this case, the company is not obliged to perform such reclamation by virtue of its mining impact on the area. This result would clearly be contrary to a fundamental purpose of the surface coal mining legislation.¹⁰

Wherefore, the decision of the administrative law judge is reversed in part and modified in part. So ordered.

IRALINE G. BARNES,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

ADMINISTRATIVE JUDGE MIRKIN CONCURRING IN RESULT:

It is only because of the ordering of the questions that it appears that the Board had to deal with the question of whether or not compliance with a state mining permit may operate to excuse compliance with any of the interim regulations. In determining that the actions complained of were not violative of 30 CFR 715.14, the Board effectively reversed the administrative law judge and disposed of the appeal. It would have been better to await a case in which we found a violation of the regulations in order to determine

¹⁰ See sec. 102(h) of the Act, which provides:

"It is the purpose of this Act to—

* * * * *

"(h) promote the reclamation of mined areas left without adequate reclamation prior to the enactment of this Act and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public." 30 U.S.C.A. § 1202(h) (West Supp. 1979).

⁹ We do not hereby accept the interpretation of the administrative law judge (Decision rendered Nov. 17, 1978, Docket No. CH8-17-R, at 8): "(b) that 'disturbing' of an existing highwall, means either the cutting into that highwall to such an extent that it renders the highwall a threat in some manner to the public or to the environment, or that the highwall is attempted to be restructured or resloped to a different degree in order to facilitate mining * * *".

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whether compliance with a state permit was sufficient to relieve responsibility.

I do agree with the holding that 30 CFR 715.14 was not violated by Cedar and I therefore concur in the result.

MELVIN J. MIRKIN,
Administrative Judge.

APPEAL OF TANACROSS, INC.

3 ANCAB 219

Decided April 23, 1979

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-14943-A, F-14943-B, dated Aug. 16, 1976, rejecting certain land selections of Tanacross, Inc., under § 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1627 (1976), *as amended*, 89 Stat. 1145 (1976).

Dismissed.

1. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

"Valid existing rights" protected by § 14 (g) of ANCSA include both interests of a temporary or limited nature and interests leading to the acquisition of title, when such interests were created prior to ANCSA and are being perfected or maintained pursuant to State or Federal law.

2. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Federal Airport Act, and compliance with such law leading to the acquisition of

title prior to ANCSA, is sufficient to create a valid existing right in the State of Alaska protected by § 14(g) of ANCSA.

3. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Pursuant to regulations in 43 CFR 2650.3-1(a), interests protected pursuant to ANCSA which lead to fee title in the State are to be excluded from conveyance to a Native corporation.

APPEARANCES: Kenneth Thomas, Jr., President, Reggie Denney, Vice President, Larry A. Wiggins, Esq., for Tanacross, Inc.; Robert Jenks, President, Interior Village Association; John Burke, Esq. and Bruce Schultheis, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Thomas Meacham, Esq., Assistant Attorney General and Martha Mills, Esq., Assistant Attorney General, for the State of Alaska, Department of Law; Martha Mills, Esq., Assistant Attorney General, for the State of Alaska, Division of Aviation.

OPINION BY

ALASKA NATIVE CLAIMS APPEAL BOARD

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1627 (1976), *as amended*, 89 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, *as amended*, 41 FR 14737 (Apr. 7, 1976), and 43 CFR Part 4,

Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to the regulations in 43 CFR Part 2650, *as amended*, and Part 4, Subpart J, the State Director is the officer of the United States Department of the Interior who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

FACTUAL BACKGROUND

By Departmental Orders of Nov. 28, 1941, Jan. 5, 1942, Mar. 4, 1947 and Dec. 28, 1947, the lands encompassing the Tanacross airport were withdrawn, enlarged and modified as Air Navigation Site Withdrawal No. 170.

On Nov. 6, 1950, the Natives of Tanacross signed a petition asking the Secretary of the Interior to establish a reservation for the exclusive use and occupancy of the Tanacross Natives. This was apparently filed in 1951 with the Department of the Interior. This petition included a property description of the land which the Tanacross Natives used and occupied in the vicinity of the Village of Tanacross. No reservation was established.

On Aug. 17, 1959, the State of Alaska, Division of Lands, submitted to the Federal Aviation Administration, a request for a conveyance to the State of Alaska of lands at the Tanacross airport, pursuant to § 16 of the Federal Airport Act. (49 U.S.C.A. § 1101 *et seq.*

(1963), 60 Stat. 170, 179, *as amended*.) On Sept. 30, 1959, the FAA transmitted the request to the Bureau of Land Management.

On Feb. 7, 1961, Air Navigation Site Withdrawal No. 170 was revoked by Public Land Order No. 2263 (26 FR 1215, Feb. 11, 1961). This public land order recognized the State of Alaska's application for an airport conveyance, but did not specifically reserve this land for a conveyance to the State of Alaska for airport purposes.

On Mar. 2, 1961, the State of Alaska requested that the airport lands be transferred to the State under the Statehood Act rather than under the Federal Airport Act.

Pending a decision on the State of Alaska's requests, on Aug. 30, 1961, the Bureau of Land Management made note of the necessity for the reservation of right-of-way which would cover 1,153 acres of the airport land in the event the airport lands were conveyed to the State of Alaska. This right-of-way was to be reserved pursuant to authority set forth in *Instructions*, 44 L.D. 513 (1916), for the benefit of various agencies of the Federal Government.

On Nov. 16, 1961, a Native protest by the Tanacross Natives was filed concerning the conveyancing of land around Tanacross. From the documents filed with this Board, it appears that the protest was a reiteration of the claims of the Tanacross Natives made in 1950. In June of 1965, a further protest was filed by the Tanacross Natives reiterating their claims to lands in the vi-

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cinity of Tanacross. The property description included the lands where the Tanacross airport is located.

On Sept. 19, 1963, the Bureau of Land Management issued a letter to the State of Alaska in response to the State of Alaska's request for conveyance of lands under the Federal Airport Act, stating that the request for airport lands was not inconsistent with its needs. The letter made conveyance of the airport lands to the State of Alaska contingent upon agreement of the State of Alaska to cover survey costs. By a decision of the same date, the State of Alaska was further ordered to publish a Notice of Conveyance.

On Sept. 20, 1963, the Bureau of Land Management rejected the State of Alaska's application for conveyance of the airport land under the Statehood Act.

On Oct. 2 through Oct. 23, 1963, notice of the proposed conveyance to the State of Alaska under the Federal Airport Act was published by the State of Alaska. On Nov. 6, 1963, the State of Alaska agreed to pay survey costs.

On Aug. 10, 1967, by way of a letter to Alaska Governor Hickel, Secretary of the Interior Stewart Udall imposed an informal freeze on land conveyancing in the State of Alaska. In this letter Secretary Udall stated that where actual construction of a road, school, airport, or other public facility was being held up solely because of a transfer of public lands, the Department of

the Interior would give such a conveyance ad hoc consideration.

On Jan. 16, 1968, the Bureau of Land Management informed the State of Alaska by letter that they were not going to transfer title to the airport lands at Tanacross unless a showing was made that airport construction was being held up solely because of the Native protest. This letter added that the conveyance would be subject to the reservations, conditions, and limitations of Title VI of the Civil Rights Act of 1964, July 2, 1964, 78 Stat. 241, 252. On Jan. 19, 1968, the State of Alaska executed a document covenanting not to discriminate on the grounds of race, color, or national origin in the use of the airport lands. The State never filed any showing that construction was being held up because of the Native protest.

On Jan. 17, 1969, PLO 4582 was signed by the Secretary of the Interior which withdrew all unreserved lands in Alaska from appropriation. This Order was amended on June 16, 1969, by PLO 4669, to permit airport conveyances.

The Federal Airport Act was repealed June 30, 1970. The Airport and Airway Development Act of 1970, May 21, 1970, P.L. 91-258, 84 Stat. 219, 235, passed as successor legislation, contained almost exactly the same language relating to airport grants.

On Mar. 18, 1971, the Bureau of Land Management reduced the size of the right-of-way that was noted

on Aug. 30, 1961, from 1,153 acres to 123.39 acres.

On Oct. 27, 1971, the Bureau of Land Management informed the State of Alaska by way of letter that the case file was ready for transmittal for signing the conveyance, except for the Tanacross Native protest waiver.

On Dec. 18, 1971, the Alaska Native Claims Settlement Act was passed which withdrew public lands in the townships where the Tanacross airport is located from all forms of appropriation subject to valid existing rights.

On Sept. 5, 1974, Tanacross selected lands under the Alaska Native Claims Settlement Act in sec. 32, T. 19 N., R. 11 E., Copper River meridian, which included *part of* the airport lands at Tanacross. On Dec. 9, 1974, Tanacross selected additional lands in T. 18 N., R. 11 E., Copper River meridian, but its application was vague as to whether they in fact selected the remaining airport lands located in this township. On Feb. 6, 1976, Doyon, Ltd., the Regional Corporation in the Tanacross area, advised the Bureau of Land Management that the selection was in error and that Tanacross, Inc., did *not* select the remaining airport lands in its second selection on Dec. 9, 1974.

On Aug. 16, 1976, the Bureau of Land Management rejected those parts of the land selection applications of Tanacross, Inc., which covered the lands sought by the State of Alaska for conveyance under the Federal Airport Act, on the grounds that the interest of the

State of Alaska in the airport lands constitutes a "valid existing right" under § 14(g) of ANCSA, and were therefore unavailable "for administrative purposes" for conveyance to Tanacross, Inc.

On Sept. 16, 1976, Tanacross, Inc., filed a Notice of Appeal with this Board from the Aug. 16, 1976 Decision of the Bureau of Land Management; and, for practical purposes, the briefing in this appeal was concluded within 12 months thereafter. The delay in the rendition of this decision has come about, in large part, due first to Secretarial review of this Board's previous ruling on valid existing rights as well as the Secretary's later reconsideration of his initial review, all of which caused this appeal to remain suspended until Dec. 4, 1978, after which time the parties were granted time to file additional briefing.

ASSERTIONS OF TANACROSS, INC.

Tanacross asserts that no title to the airport lands has passed to the State of Alaska, that the Bureau of Land Management has jurisdiction over the lands and therefore the lands are "public lands" within the meaning of § 3(e) of ANCSA. They further assert that since the interest in the airport lands sought by the State of Alaska is not a lease, contract, permit, right-of-way or easement, that the State does not have a valid existing right in the lands as defined in § 14(g) of ANCSA.

Tanacross also claims that the Native protests filed by the Tanacross

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Natives to conveyancing in the area of Tanacross represents a superior claim to the airport lands and that the State of Alaska is trespassing on these airport lands and is responsible for any damage thereto.

Although Tanacross claims it has a right to select and have the airport lands conveyed to it, Tanacross admits that it will have to convey the existing airport site to the State of Alaska under § 14(c)(4) of ANCSA. It claims, however, that after Dec. 18, 1971, § 14(c)(4) of ANCSA should be the sole procedure applied to airport conveyances that are in conflict with village land selections.

Lastly, Tanacross contends that the Decision of the Bureau of Land Management which stated the rejection was for "administrative purposes," is arbitrary and capricious in that the decision must be based upon legal grounds.

In the event that this Board finds that the State of Alaska does have a vested right in the airport lands, Tanacross requests an evidentiary hearing before the Board on the necessity of the conveyance and the amount of land to be conveyed to the State.

ASSERTIONS OF THE BUREAU OF LAND MANAGEMENT

The Bureau of Land Management alleges that the only issue before this Board is whether the State of Alaska had a valid existing right to the Tanacross airport property.

They state that the letter of commitment of Sept. 19, 1963, and the subsequent use of the airport lands by the State of Alaska segregated the land from entry for all other purposes. Under these circumstances, the State of Alaska has a valid existing right which is protected under § 11(a)(1) of ANCSA.

ASSERTIONS OF THE STATE OF ALASKA

The State of Alaska alleges that the airport land is not public land within the meaning of § 3(e) of ANCSA. The "letter of commitment" of Sept. 19, 1963, from the Bureau of Land Management to the State of Alaska created equitable title in the airport lands in the State of Alaska once the State complied with the requirements of the letter of commitment. Since the State did comply with the contingencies set forth in the letter, equitable title passed to the State and such equitable title is recognized as a valid existing right under § 11(a)(1) and § 14(g) of ANCSA. The State also argues that issuance of a "letter of commitment" segregates the land and makes it unavailable for Native selection under ANCSA.

The State maintains that if the lands are available for selection by Tanacross, Inc., their interests in the airport lands are also protected by § 14(c)(4) of ANCSA which requires the village corporation to convey existing airport sites to the State, Federal Government, or municipality. They further state that

since they are not seeking any land other than the existing airport sites, an evidentiary hearing as requested by Tanacross is not necessary.

DISCUSSION

The sole issue to be resolved in this appeal is whether the State of Alaska's interest in the airport land is protected as a "valid existing right" within the terms of ANCSA. ANCSA, in § 11(a)(1), withdraws public lands for selection by Native corporations "subject to valid existing right."

Furthermore, § 14 of ANCSA, which is entitled "Conveyance of Lands," states in subparagraph (g) in part as follows:

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. * * *

The Board has previously ruled, in *Appeal of Ekklutna, Inc.*, 1 ANCAB 190, 83 I.D. 619 (1976) [VLS 75-10], that ANCSA protects, as "valid existing rights," those rights which do not lead to a grant of fee title and which were created prior to ANCSA. Rights leading to acquisition of title, the Board found, were excluded from

conveyance to the selecting Native corporation under § 22(b) of ANCSA; interests of a more limited nature were protected by § 14(g) of ANCSA as valid existing rights to which the conveyance was subject.

The Secretary of the Interior, however, has adopted a different conclusion which overrules and binds the Board.

In interpreting what interests are included within the meaning of the term "valid existing rights" under ANCSA, the Secretary has determined that certain rights of purchase held by third parties which were outstanding but unperfected as of the date of passage of ANCSA constitute "valid existing rights," and that these rights which lead to acquisition of fee title, are protected under § 14(g) of ANCSA. In arriving at this conclusion the Solicitor's Opinion adopted by Secretarial Order No. 3029 as the position of the Department on the subject of valid existing rights, stated in part as follows:

A fundamental principle of ANCSA is that "[a]ll conveyances made pursuant to this Act shall be subject to valid existing rights." In addition, the sections withdrawing land for Native selection (Secs. 11(a), 16(a)) expressly provide that the withdrawal is "subject to valid existing rights." * * *

Although the phrase "valid existing rights" is not specifically defined in Sec. 3 "Definitions", both the statute and the legislative history offer guidance as to its meaning.

Section 14(g) provides in pertinent part:

"Where prior to patent of any land or minerals under this Act, a lease, con-

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tract, permit, right-of-way, or easement (including a lease issued under sec. 6(g) of the Alaska Statehood Act) has been issued * * * the patent shall contain provisions making it subject to the lease, contract (etc.) * * *

Section 22(b) directs the Secretary "to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites or small tract sites, and who have fulfilled all the requirements of law prerequisite to obtaining a patent."

Section 22(c) protects persons who have initiated valid mining claims or locations in their possessory rights if they have met the requirements of the mining laws.

By regulation the Department has construed Sections 14(g) and 22(b) and provided the mechanism for implementing them. 43 CFR 2650.3-1(a) provides:

"Pursuant to sections 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entry or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under section 6(g) of the Alaska Statehood Act), contracts, permits rights-of-way [sic], or easements."

* * * * *

* * * I do not believe the listing of the rights to be protected was intended to be limiting, but rather was *ejeusdem generis*. The regulation already quoted (43 CFR 2650.3-1(a)) precedes its list with "such as those created by * * *," indicating clearly that the list is not exhaustive. Furthermore, there is not logical [sic] reason why Congress would have intended to protect rights of municipalities or individuals which lead to the acquisition of title under such Federal

laws as the Townsite Act or the Homestead Act, but did not intend to protect the same municipality or individual when the law under which the rights are being perfected is a State law.

It is my conclusion, therefore, that the department's regulations have construed "valid existing rights" under ANCSA to include rights perfected or maintained under State as well as Federal laws leading to the acquisition of title.

[Footnotes omitted. Italics in original.]
43 FR 55288-89 (Nov. 27, 1978)

Tanacross asserts that since the interest in the airport lands which is sought by the State of Alaska is not a lease, contract, permit, right-of-way, or easement, the State of Alaska does not have a valid existing right to the airport lands as that phrase is used in ANCSA.

[1] It is clear, however, that it is the policy of the Department of the Interior that valid existing rights are not limited to leases, contracts, permits, rights-of-way or easements mentioned in § 14(g) of ANCSA, but include other interests whether or not they are specifically set forth in ANCSA. The Board therefore finds that "valid existing rights" protected by § 14(g) of ANCSA include both interests of a temporary or limited nature and interests leading to the acquisition of title, when such interests were created prior to ANCSA and are being perfected or maintained pursuant to State or Federal law.

The State of Alaska contends that pursuant to the Federal Airport Act of 1946, it gained a valid existing right to the lands at the Tanacross Airport and that title vested in the State of Alaska. This

Act (49 U.S.C.A. § 1115 (1963), 60 Stat. 179, *as amended*) provides as follows:

(a) Whenever the Administrator determines that use of any lands owned or controlled by the United States is reasonably necessary for carrying out a project under this chapter, or for the operation of any public airport, he shall file with the head of the department or agency having control of such lands a request that such property interest therein as he may deem necessary be conveyed to the public agency sponsoring the project in question or owning or controlling the airport. Such property interest may consist of the title to or any other interest in land or any easement through or other interest in air space.

(b) Upon receipt of a request from the Administrator under this section, the head of the department or agency having control of the lands in question shall determine whether the requested conveyance is inconsistent with the needs of the department or agency, and shall notify the Administrator of his determination within a period of four months after receipt of the Administrator's request. If such department or agency head determines that the requested conveyance is not inconsistent with the needs of that department or agency, such department or agency head is authorized and directed, with the approval of the President and the Attorney General of the United States, and without any expense to the United States, to perform any acts and to execute any instruments necessary to make the conveyance requested, but each such conveyance shall be made on the condition that the property interest conveyed shall automatically revert to the United States in the event that the lands in question are not developed, or cease to be used, for airport purposes. May 13, 1946, c. 251, § 16, 60 Stat. 179.

This statute was repealed effective June 30, 1970, and it was replaced by 49 U.S.C. § 1723 (1976) [P.L. 91-258 (1970)]. However, in order to

protect existing actions and determinations made under 49 U.S.C.A. § 1115 (1963), Congress included a savings provision in the Act of May 21, 1970, P.L. 91-258, § 52(c) which provided as follows, and which this Board finds protects whatever interest the State may have gained under 49 U.S.C.A. § 1115:

Saving Provisions.—All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, grants, rights, and privileges which have been issued, made, granted, or allowed to become effective by the President, the Secretary of Transportation, or any court of competent jurisdiction under any provision of the Federal Airport Act, as amended, which are in effect at the time this section takes effect, are continued in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Secretary of Transportation or by any court of competent jurisdiction, or by operation of law. § 52(c) of P.L. 91-258. 70 U.S. Code Congressional and Administrative News, p. 274.

The State of Alaska made a request for an airport conveyance under this Act. The Federal Aviation Administration made a determination that the conveyance to the State of Alaska was necessary for the operation of the airport at Tanacross. The Bureau of Land Management, pursuant to the request of the State of Alaska and the Federal Aviation Administration, issued a letter stating that conveyance of the Tanacross airport lands was not inconsistent with its needs but made conveyance contingent upon the State of Alaska complying with certain conditions. The State of Alaska appears on the record to have met these conditions and for considerable time

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has been exercising jurisdiction over the Tanacross airport.

Tanacross asserts that title has not vested because the conveyance has not been approved by the President and the Attorney General. According to the Federal Airport Act, if conveyance is not inconsistent with the needs of the agency controlling the land, the agency head is " * * * directed, *with the approval of the President and the Attorney General of the United States*, * * * to make the conveyance." (Italics added.)

Presidential approval was waived by Executive Order No. 10536 (June 9, 1954, 19 FR 3437).

Pursuant to authority given the Attorney General under 28 U.S.C. 510, the Attorney General delegated to his assistants the authority to approve airport conveyances under the Federal Airport Act. (See Order No. 273-62, 27 FR 579.) There has been no approval of either the Attorney General or any Assistant Attorney General in this case. The apparent reason for involvement of the Attorney General or his assistants prior to patent is to insure that legal requirements have been met by the variety of agencies which might control lands desired for airport use, before conveyance under the Federal Airport Act. There would be no point in imposing a requirement of approval by the Attorney General unless Congress contemplated an objective review of each case by the Department of Justice. While such approval would be expected if all statutory and regulatory requirements had been met, approval could

not be considered a ministerial act.

In public land law, the term "equitable title" is used to describe the interest held by an entryman who, upon full compliance with requirements of the law, has rights in the land superior to all other claims, and is entitled to issuance of patent by the Federal Government, which holds only legal title to the land. The holder of equitable title has a vested interest; i.e., that interest, acquired by a party when all prerequisites for the acquisition of title have been complied with, which, attaching to the land, deprives Congress of its power to dispose of the property. (*Appeal of Eklutna, Inc.*, 1 ANCAB 190, 83 I.D. 619 (1976) [VLS 75-10].)

Due to the fact that the approval of the Attorney General was a statutory prerequisite for passing of title under the Federal Airport Act, the failure to gain such approval prevented the vesting of equitable title to the airport lands in the State of Alaska. However, this Board does find that the State of Alaska's interest in these lands constitutes a valid existing right as that term has been interpreted by the Secretary of the Interior in S.O. 3029 and the Memorandum of the Office of the Solicitor adopted by this Order.

[2, 3] Application by the State of Alaska for lands under the Federal Airport Act and compliance with such law leading to the acquisition of title prior to ANCSA is sufficient to create a valid existing right in the State of Alaska protected by § 14(g) of ANCSA. Pursuant to

regulations in 43 CFR 2650.3-1(a), interests protected pursuant to ANCSA which lead to fee title in the State are to be excluded from conveyance to a Native corporation.

As to the assertion of Tanacross, Inc., that claims and protests filed by Natives of Tanacross in 1950 and in the 1960s created a right superior to the State's, Congress in § 4(g) of ANSCA extinguished all claims based on aboriginal title. The Board has previously noted in *Appeal of Eklutna, Inc.* 1 ANCAB 190, 83 I.D. 619 (1976) [VLS 75-10]:

* * * State land selections, already encumbered by aboriginal title to lands on which use and occupancy could be proved, were now subjected to a statutory prior right of selection by Native Corporations, *based not on aboriginal title, but on Congressional grant in ANCSA.* (Italics added.)

ORDER

It is hereby Ordered that the decision of the Bureau of Land Management in issue in this appeal is hereby affirmed and this appeal is hereby Ordered dismissed.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
*Chairperson, Alaska Native
Claims Appeal Board.*

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

DENNIS R. PATRICK

1 IBSMA 158

Decided April 24, 1979

Appeal by Dennis R. Patrick from a

Dec. 19, 1978 decision of Administrative Law Judge Torbett (Docket No. NX8-4-R) upholding a notice of violation and two orders of cessation issued by an inspector of the Office of Surface Mining Reclamation and Enforcement, in accordance with sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, on the basis of his finding of violations of 30 CFR 715.12, 715.15(a)(6), 715.16 and 715.17(a) of the Department's interim regulations.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: State Regulation

The initial Federal regulatory program is not applicable to a surface coal mining operation which is located on State land and which is not subject to State regulation within the scope of any of the initial performance standards.

APPEARANCES: Marcia A. Smith, Esq., of Smith and Smith, Corbin, Kentucky, for Dennis R. Patrick; John Philip Williams, Esq., of the Office of the Field Solicitor, Knoxville, Tennessee, and Michael J. Kurman, Esq., and Marcus P. McGraw, Esq., of the Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; L. Thomas Galloway, Esq., and Richard L. Webb, Esq., of the Center for Law and Social Policy, Washington, D.C., for Council of the Southern Mountains, Inc., The Environmental Policy Institute, and The Appalachian Coalition; David R. Wooley, Esq., of the Appalachian Research and Defense Fund, Inc., for The Tug Valley Recovery Center, Inc., and Save Our Mountains.

April 24, 1979

*OPINION BY THE BOARD OF
SURFACE MINING AND
RECLAMATION APPEALS*

An appeal has been filed with the Board, by Dennis R. Patrick, from an administrative law judge's decision upholding Notice of Violation No. 78-II-1-002 and Orders of Cessation Nos. 78-II-1-001 and 78-II-1-003, issued to Patrick by the Office of Surface Mining Reclamation and Enforcement (OSM) in accordance with sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (91 Stat. 445, 505; 30 U.S.C.A. § 1271(3) (West Supp. 1979)). There is no dispute between the parties about the underlying factual premises for the violations cited by OSM; rather, this appeal emanates from the judge's resolution of the following legal issues: (1) whether OSM has jurisdiction over Patrick's operation, even though the Kentucky Department for Natural Resources and Environmental Protection has determined that his operation is not subject to the Commonwealth's strip mining statute and regulations; (2) whether Patrick has conducted a "surface coal mining operation," within the meaning of this term as it is used in the Act and federal interim regulations; (3) whether the excavation of coal which is incidental to a privately funded construction project is exempted from the coverage of the Act under sec. 528(3) (30 U.S.C.A. § 1278(3) (West Supp. 1979)); and (4) whether, in view of the facts presented, Patrick is responsible for any violations of the Act and initial

federal performance requirements that may have occurred on his property.

The administrative law judge resolved all of these issues in favor of OSM. We disagree with the judge's resolution of the first issue and, therefore, reverse his decision.

*Factual and Procedural
Background*

On or about June 11, 1977, Patrick purchased a tract of land (comprising approximately 3 acres) in the Highland Park area of Williamsburg, Kentucky. On Feb. 16, 1978, he filed a "housing development" plan for this property with the Kentucky Department of Natural Resources and Environmental Protection, Division of Reclamation (Patrick's Brief, Exhibit 1). That plan called for the excavation of material, including coal, to create a level bench for a housing development.

On Mar. 22, 1978, the Director of the Division of Permits, in Kentucky's Department of Natural Resources and Environmental Protection, transmitted a memorandum to Patrick in which it was indicated that his proposed excavation of coal would not constitute strip mining, under Kentucky law, and that Patrick would not be required to obtain a strip mining permit (Tr. 135-36; Patrick's Brief, Exhibit 2). On the same date Patrick entered into a written agreement with James Veach, who signed that agreement on behalf of the James Veach Contracting Co., whereby Veach agreed to excavate coal and

other material from Patrick's property in accordance with the "Patrick Housing Development" plan, to pay Patrick 25 percent of the proceeds received by Veach from his sale of all merchantable coal removed from this property, to maintain liability and Workmen's Compensation insurance, and to indemnify Patrick for all liability that he might suffer as a result of the excavation activities (Patrick's Brief, Exhibit 3). Patrick and Veach entered into a secondary agreement whereby Patrick was to supplement Veach's share of the proceeds from the sale of coal, if these became inadequate to compensate Veach for his performance under the principal agreement (Tr. 60, 125).

After Mar. 22, 1978, Veach's contracting company conducted operations on Patrick's property in accordance with the above-described contracts. Patrick has received 25 percent of the proceeds from the sale of 186 tons of coal since that date (Tr. 53-54; Affidavit in Support of Motion to Supplement and Certify for Appeal Summary Judgment Order, dated Nov. 10, 1978).

On the basis of several citizens' complaints, including those of the Mayor and Chairman of the Planning Commission of Williamsburg, Kentucky, an OSM inspector visited Patrick's property on May 26, 1978, and, on the same date, served Patrick with Notice of Violation No. 78-II-1-002 and Order of Cessation No. 78-II-1-001. The notice of violation indicates three

violations of the interim regulations: (1) improper disposal of organic material, in violation of 30 CFR 715.15(a)(6), 42 FR 62683 (Dec. 13, 1977); (2) failure to save topsoil, in violation of 30 CFR 715.16, 42 FR 62684 (Dec. 13, 1977); and (3) failure to post various signs and markers, in violation of 30 CFR 715.12, 42 FR 62680-81 (Dec. 13, 1977) (Exhibit R1). The order of cessation indicates that Patrick has failed to pass surface drainage from the area disturbed by his excavation activities through a sedimentation pond, in violation of 30 CFR 715.17(a), 42 FR 62685 (Dec. 13, 1977), and that this failure has resulted in, or could be reasonably expected to cause "significant, imminent environmental harm to land, air or water resources" (Exhibit R2). Patrick was granted until June 10, 1978, to abate the conditions specified in the notice and order.

On June 13, 1978, Patrick was issued Order of Cessation No. 78-II-1-003 for his failure to abate certain violations specified in the above-described notice and order (Exhibit R3). A minesite hearing was conducted on July 17, 1978, pursuant to 30 CFR 722.15, 42 FR 62701-02 (Dec. 13, 1977), and sec. 521(a)(5) of the Act (30 U.S.C.A. § 1271(a)(5) (West Supp. 1979)). At the conclusion of this hearing, the presiding OSM officer determined that the May 26 and June 13 orders of cessation had been validly issued to Patrick (*see* Patrick's Brief, Exhibit 6). Patrick sought further review of the notice and

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orders, and a hearing date before an administrative law judge was set for Dec. 12, 1978, pursuant to sec. 525 of the Act (30 U.S.C.A. § 1275 (West Supp. 1979)).

On Oct. 2, 1978, Patrick's counsel filed a motion for summary judgment with the administrative law judge, in which there were set forth the same four issues raised before this Board on appeal (*see* text at 267). In his Memorandum Opinion and Order, dated Oct. 30, 1978, the judge held that Patrick's argument on the first issue was invalid, as a matter of law, and that the remaining arguments could not be evaluated without evidence concerning the factual issues underlying them.

A pretrial conference was held on Nov. 6, 1978, at which Patrick agreed to submit an affidavit in support of summary disposition of his three remaining arguments. This affidavit was filed on Nov. 13, 1978; it contains two statements:

(1) Applicant intended for Veach to remove an unknown quantity of coal, which he believed would exceed two hundred and fifty (250) tons of coal, from his property within twelve (12) consecutive calendar months.

(2) Applicant intended for said coal to be sold by Veach and he has received payment from Veach for the sale of approximately 186 tons of said coal.

(Affidavit in Support of Motion to Supplement and Certify for Appeal Summary Judgment Order, dated Nov. 10, 1978). On the basis of these statements the administrative law judge issued a second memorandum opinion and order in

which he held that "the Applicant in [*sic*] conducting surface coal mining operations as defined in 30 U.S.C. section 1291 (28), and that the excavation of this coal, even if incidental to a privately funded construction project is not exempt from the Surface Mining Control and Reclamation Act of 1977 under 30 U.S.C. section 1278(3)." Memorandum Opinion and Order, Docket No. NX8-4-R, Nov. 28, 1978. The issue of whether OSM properly cited Patrick, in the notice of violation and orders of cessation, was reserved by the judge for an evidentiary hearing.

On Nov. 30, 1978, OSM modified the notice and orders issued to Patrick on May 26 and June 13, 1978, by adding James Veach Contracting Company as "a permittee or operator to whom the * * * Notice and Orders are directed." OSM also filed a motion to add James Veach as a party to the December 12 evidentiary hearing; the judge rejected this motion.

At the conclusion of the December 12 hearing, the judge ruled from the bench that Patrick was responsible for the violations cited by OSM, for the reason that he ultimately was responsible for the operations taking place on the subject property. The judge confirmed this bench ruling in a written decision dated Dec. 19, 1978.

Discussion

Patrick's primary argument against OSM's assertion of jurisdiction over his operation is that "dur-

ing the initial regulatory program, OSM has no jurisdiction over an operation which is not regulated by the State in which it is located" (Patrick's Brief at 5). This is not quite an accurate statement of OSM's limited authority under the initial regulatory program. In lieu of it we find that, under the initial regulatory program, OSM has no jurisdiction over a surface coal mining operation which occurs on state land and which is not subject to existing state regulation within the scope of any of the initial federal performance standards. Patrick's operation has been shown to be located on land within the jurisdiction of the Commonwealth of Kentucky. It has not, however, been shown to be subject to existing Kentucky regulation within the scope of any of the initial federal performance standards. Our decision, therefore, is to reverse the decision of the administrative law judge and to vacate the notice of violation and orders of cessation which were issued to Patrick by OSM. Our reasons are set forth below.¹

In secs. 501(a) and 502 of the Surface Mining Control and Reclamation Act of 1977 (Act), Congress mandated that an initial regulatory program be established to enforce

and administer the environmental performance standards referenced in Sec. 502(c). Sec. 502(c) provides, in relevant part:

(c) On and after nine months from the date of enactment of this Act, *all surface coal mining operations on lands on which such operations are regulated by a State* shall comply with the provisions of subsections 515(b)(2), 515(b)(3), 515(b)(5), 515(b)(10), 515(b)(13), 515(b)(15), 515(b)(19), and 515(d) of this Act * * *. [Italics added.]

30 U.S.C.A. § 1252(c) (West Supp. 1979). The underlined portion of this language is Congress' statement of the applicability of the initial regulatory program within the various states. This statement indicates that the environmental performance standards incorporated into the initial regulatory program should be enforced on lands within the jurisdiction of the various states, but *only* with respect to the surface coal mining operations which are regulated by a state on those lands.²

² The most comprehensive Congressional explanation of sec. 502 of the Act is in the report of the Senate Committee on Energy and Natural Resources on S. 7. The differences between sec. 402 of S. 7 and sec. 502 of the Act do not qualify the relevance of the Senate report in this regard. See H.R. Rep. No. 493, 95th Cong., 1st Sess. 101-02 (1977). The Senate report contains a passage:

"All surface coal mining operations, which include, by definition surface impacts incident to underground coal mines, are subject to the initial regulation procedures of section 402 of this bill, but only to the extent that they are located on lands on which operations are regulated by a State. Surface coal mining operations located in the two States (Alaska and Arizona) which presently have no regulatory programs directed toward the environmental control of surface coal mining operations are not subject to section 402. Neither are the surface effects of underground coal mining operations subject to section 402, unless the the [sic] existing State regulatory program is directed at the effects of these

¹ Our discussion of Patrick's jurisdictional argument embraces analysis not only of the pertinent language of the regulations and Act but also of portions of the published comments to the regulations and of the legislative history of the Act. Our reference to these secondary materials reflects our determination that the arguments raised by OSM and the intervenors regarding the "plain meaning" of the language of the regulations and Act are not implausible. Under such circumstances, it is necessary for us to resort to explanatory materials.

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On Dec. 13, 1977, the Secretary of the Interior caused to be published regulations which set forth the contents of the initial regulatory program.³ Sec. 710.3(a) of

these regulations contains an acknowledgement of the Congressional mandates in secs. 501(a) and 502 of the Act:

operations. This policy is entirely consistent with the State-lead philosophy of this legislation. However, it should be noted that States which do not have a regulatory program established by statute may still participate in the interim program through administrative action of a suitable State agency. Certification of this fact by the Governor of a State to the Secretary of the Interior is sufficient to qualify that State for the interim funding provided in section 402." S. Rep. No. 128, 95th Cong., 1st Sess. 71 (1977).

According to OSM, this passage clearly supports its proposition that there are only three categories of lands which are not embraced by the initial regulatory program: (1) lands in a state which does not regulate any part of surface coal mining operations (that is, lands in Alaska and Arizona); (2) federal lands; and (3) Indian lands. OSM's Brief at 8. OSM has ignored, however, the Senate committee's statement that the "surface effects of underground coal mining operations are not subject to [the requirements of the initial regulatory program] unless [the] existing State regulatory program is directed to the effects of these operations." S. Rep. No. 128, *supra*.

The "surface effects of underground coal mining operations" comprise part of the definition of "surface coal mining operations" contained in S. 7 (sec. 501(5)). The same definition of "surface coal mining operations" appears in the Act and regulations. See 30 U.S.C.A. § 1291(28) (West Supp. 1979); 30 CFR 700.5 (1978), 42 FR 62676-77 (Dec. 13, 1977). In light of this, there is no rational basis for distinguishing between "surface effects of underground coal mining operations" and other examples of "surface coal mining operations" in determining whether these are regulated by a state under an existing state regulatory program. It must be concluded, therefore, that Congress intended that a surface coal mining operation should not be regulated by the Secretary, under the initial regulatory program, if it is located on state land and is not regulated by a state. This restriction on OSM's jurisdiction on state lands, under the program, is an expression of the "State-lead philosophy" underlying the Act. See S. Rep. No. 128, *supra*.

³ These regulations are codified in 30 CFR Chapter VII as new Parts 700, 710, 715, 716, 717, 718, 720, 721, 722, 723, 725, 740, 795, and 830. 42 FR 62675 *et seq.* (Dec. 13, 1977).

(a) The Secretary is directed to implement an initial regulatory program within six months after the date of enactment of the Act in each State which regulates any aspect of surface coal mining under one or more State laws until a State program has been approved or until a Federal program has been implemented.

30 CFR 710.3(a), 42 FR 62677-78 (Dec. 13, 1977). This provision indicates the state action which triggers the application of the initial regulatory program to a state. It is complemented by two other provisions of the regulations which indicate, generally, those surface coal mining operations that are subject to the requirements of the program, within an affected state. The first of these two provisions is sec. 710.11(a) (1):

(a) *Operations on lands on which such operations are regulated by a State:* (1) The requirements of the initial regulatory program do not apply to surface mining and reclamation operations which occur on lands within a State which does not regulate any part of such operations. [Italics in original.]

30 CFR 710.11(a) (1), 42 FR 62679 (Dec. 13, 1977). Although in negative phrasing, this provision is essentially a reiteration of sec. 502(c) of the Act. It indicates to us that some regulation of a surface coal mining and reclamation operation, on the part of the state which has jurisdiction over the land on which it occurs, is a prerequisite for the

application of the initial regulatory requirements to that operation.⁴

The second general provision for the application of the initial regulatory requirements to particular surface coal mining and reclamation operations is expressed in sec. 715.11(a):

(a) *Compliance.* All surface coal mining and reclamation operations conducted on lands where any element of the operations is regulated by a State shall comply with the initial performance standards of this Part according to the time schedule specified in § 710.11. [Italics added.]

30 CFR 715.11(a); 42 FR 62680 (Dec. 13, 1977). The published ex-

⁴The nature of state regulation, which makes applicable the requirements of the initial regulatory program to a particular surface coal mining operation, is described in a published explanation of sec. 710.11(a)(1):

"A comment was received suggesting that paragraph (a) be changed to clarify that the interim standards do not apply in States in which only 'collateral' regulation of mining occurs. As examples of such 'collateral' regulation, the commenter cited minimum wage laws and water quality control. Regulation by the State minimum wage law does not constitute regulation in a State so as to make the interim standards applicable. However, regulation of water quality relating to mining does in fact constitute regulation of mining in a State so as to make all the initial standards applicable in that State. Under § 502 of the Act any regulation in a State within the scope of any of the initial performance standards is regulation that triggers the application of the Federal initial performance standards within that State." (Italics added.)

30 CFR 710.11(a), 42 FR 62641 (Dec. 13, 1977). This language indicates that all of the initial federal performance standards are applicable in a state to any surface coal mining operation which is regulated by the state in any manner within the scope of any of these performance standards. This language does not indicate (as OSM insists in its Brief at 4) that the regulation by a state of any surface coal mining operation, in a manner within the scope of any of the initial performance standards, is regulation which makes applicable all of the federal standards to all surface coal mining operations within that state.

planation of this provision is particularly noteworthy:

4. A few commenters questioned the meaning of the phrase "where any element of the operations is regulated by a state" in § 715.11(a). The phrase is rooted in § 502(a) of the Act and is intended to be a general statement of applicability consistent with § 710.11 of these regulations. The performance standards apply to coal mining operations currently regulated by a State under other State or Federal statutes including the Federal Water Pollution Control Act and State laws governing mining. [Italics added.]

42 FR 62642 (Dec. 13, 1977). This explanation of sec. 715.11(a) is in no way equivocal; it indicates that the Secretary contemplated that the requirements of the initial regulatory program should be applied, on state lands, only to those surface coal mining operations which are subject to state regulation.

The only evidence in the record of any regulation by the Commonwealth of Kentucky of operations such as that conducted by Patrick is contained in Exhibits 4 and 5 of Patrick's Brief. Exhibit 4 is a copy of a "policy memorandum" issued by the Secretary of Kentucky's Department for Natural Resources and Environmental Protection. Therein it is indicated that the extraction of coal which is incidental to a construction project is not subject to Kentucky's strip mining law. Patrick's operation has been determined, by Kentucky officials, to be a construction project (Tr. 135-36; Patrick's Brief, Exhibit 2). That determination is not, per se, "regulation" within the scope of any of

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the initial performance standards.

Exhibit 5 of Patrick's Brief is a copy of "Engineering Guidelines" pertinent to construction projects in Kentucky that entail the extraction of coal. Several of these guidelines are within the scope of the initial performance standards. The date which this document bears, however, is November 1978 (OSM issued its notice of violation and orders of cessation to Patrick in May and June of 1978), and there has been no showing on the record that these guidelines are applicable to Patrick's operation.⁵

Wherefore, the decision of the administrative law judge is reversed. So ordered.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

**CHIEF ADMINISTRATIVE JUDGE
IRWIN DISSENTING:**

I. Introduction

I think the majority's decision in this case is incorrect as a matter of law. Its holding that the Office of Surface Mining does not have jurisdiction over Patrick's activities is supported neither by the Department's regulations and the Secretary's statements about what they were intended to mean nor by the language of sec. 502(c) of the Act

and Congress' statements about what it was intended to mean. The majority's determination that the regulations are unclear stretches the benefit of a barely plausible doubt beyond a reasonably credible limit. Its interpretation of the statute and legislative history, apart from being contrary to that of the Secretary, is at best dubious.

II. Issue

The majority holds that the Office of Surface Mining has no authority to enforce the performance standard requirements of the initial regulatory program against Patrick. Since the removal of coal incidental to Patrick's housing construction project is not regulated by the Commonwealth of Kentucky under that State's surface mining law, the majority contends Patrick need not comply with sec. 502(c) of the Act because his project is not a "surface coal mining operation[s] on lands on which such operations are regulated by a State." Sec. 502(c), 30 U.S.C.A. § 1252(c) (West Supp. 1979). That is, since Kentucky's regulation of Patrick's activity under state law is not within the scope of the initial regulatory program, OSM cannot impose these standards under federal law.

III. Discussion

A. Introduction

The majority begins its discussion with the statute and its history. It does so, it says, because it determines that OSM's (and intervenors') arguments concerning the

⁵ Since our resolution of the first issue presented by Patrick is dispositive of the appeal, there is no reason for us to address the other issues raised by the parties.

regulations are "not implausible" and therefore it finds it necessary to resort to these "secondary materials."¹ I find those arguments not only plausible but convincing. I think the majority unnecessarily exaggerates a mere trace of ambiguity in the applicable regulations in order to determine it necessary to consider the language of sec. 502(c) and the legislative history of the statute. While I do not find the majority's interpretation of these secondary materials persuasive either, I prefer to start, as we recently indicated we should,² with the regulations and the Secretary's statements about their intended meaning.

B. *The Regulations and the Comments*

The Secretary's regulations which implement the requirement for an initial regulatory program³ provide, in Part 710, "general introductory and applicability material."⁴ Part 710 includes a provision dealing specifically with the applicability of the regulations.⁵ This provision, 710.11, is divided into subsections dealing with "Operations on lands on which such operations are regulated by a

State," "Operations on Indian Lands," "Operations on Federal lands," and "Operations on all lands."⁶ Subsec. 710.11(a)(1) provides that "[t]he requirements of the initial regulatory program do not apply to surface mining and reclamation operations which occur on lands within a State which does not regulate any part of such operations." As this is affirmatively phrased elsewhere, "if a State regulates surface coal mining operations, such operations must comply with the Act and regulations,"⁷ provided, of course, that such operations are on lands regulated by a state, i.e., lands under its jurisdiction.⁸

This understanding of 30 CFR 710.11(a)(1) is confirmed by the phrasing and explanation of that subsection when it was originally proposed and by the only explanatory comment relating directly to it in its final, adopted form. As originally proposed, sec. 710.11 read:

§ 710.11 Applicability.

(a) *Operations on State lands.* (1) The requirements of the initial regulatory program do not apply to surface coal mining and reclamation operations

¹ 30 CFR 710.11(a), (b), (c), and (d) (1978), 42 FR 62679 (Dec. 13, 1977).

² Comment 1, 42 FR 62641 (Dec. 13, 1977).

³ Federal lands, not under state jurisdiction, are regulated in accordance with 30 CFR 710.11(c) and, ultimately, with sec. 523, 30 U.S.C.A. § 1273 (West Supp. 1979), of the statute. Indian lands, likewise not under state jurisdiction, are regulated in accordance with 30 CFR 710.11(b)—that is, in accordance with the performance standards incorporated in 25 CFR, Part 177, Subpart B—and, ultimately, with sec. 710, 30 U.S.C.A. § 1300 (West Supp. 1979), of the statute. *Cf.*, secs. 701(4), (9), and (11), 30 U.S.C.A. §§ 1291 (4), (9), and (11) (West Supp. 1979) of the statute.

⁴ Majority opinion, *supra*, at 270, note 1.
⁵ *Dayton Mining Co., Inc.*, 1 IBSMA 125, 128, 140, 86 I.D. 241 (1979).
⁶ The regulations were published on Dec. 13, 1977, at 42 FR 62639-62716, and are codified at 30 CFR Part 700. The requirement to promulgate these regulations is set forth in sec. 501(a), 30 U.S.C.A. § 1251(a) (West Supp. 1979), of the statute.

⁷ 30 CFR 710.1(a) (1978), 42 FR 62677 (Dec. 13, 1977).

⁸ 30 CFR 710.11 (1978), 42 FR 62679 (Dec. 13, 1977).

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which occur on lands within a State which does not regulate such operations. ["]

The supplementary information preceding the proposed rules stated: "Section 710.11 states who is covered by the provisions of the Act and regulations. *Surface and underground coal mining operations in States regulating coal mining are covered by these regulations during the initial regulatory program.*"¹⁰ (Italics added.)

The only comment on sec. 710.11 (a) published in conjunction with the promulgation of the final regulations confirms this understanding of the Secretary's intended coverage of the initial regulatory program.¹¹ The majority states that this comment

indicates that *all* of the initial federal performance standards are applicable in a

¹⁰ 42 FR 44928 (Sept. 7, 1977).

¹¹ 42 FR 44921 (Sept. 7, 1977).

¹² "4. Section 710.11 sets forth the general obligations under the Act of those mining coal, describes the application of those obligations on May 4, 1978, and for the application of those standards to certain structures and facilities. * * *

"A comment was received suggesting that paragraph (a) be changed to clarify that the interim standards do not apply in States in which only 'collateral' regulation of mining occurs. As examples of such 'collateral' regulation, the commenter cited minimum wage laws and water quality control. Regulation by the State minimum wage law does not constitute regulation in a State so as to make the interim standards applicable. However, regulation of water quality relating to mining does in fact constitute regulation of mining in a State so as to make all the initial standards applicable in that State. *Under § 502 of the Act any regulation in a State within the scope of any of the initial performance standards is regulation that triggers the application of the Federal initial performance standards * * **" (Italics added.) 42 FR 62641 (Dec. 13, 1977).

state to any surface coal mining operation which is regulated by the state in any manner within the scope of any of these performance standards. This language does not indicate (as OSM insists in its brief at 4) that the regulation by a state of any surface coal mining operation, in a manner within the scope of any of the initial performance standards, is regulation which makes applicable all of the federal standards to all surface coal mining operations within that state. ["] (Italics in original.)

The majority misconstrues the comment. The comment does not speak in terms of regulation of operations, it speaks in terms of regulation of mining; *e.g.*, "[R]egulation of water quality related to *mining* does in fact constitute *regulation of mining* in a State so as to make all the initial standards applicable in that State."¹³ (Italics added.)

The interpretation of 30 CFR 710.11(a) above is supported by other, related regulations and the comments on them. 30 CFR 710.3 (a), concerning the statutory authority of the Secretary for the initial regulatory program, provides:

The Secretary is directed to implement an initial regulatory program within six months after the date of enactment of the Act *in each State which regulates any aspect of surface coal mining under one or more State laws until a State program has been approved or until a Federal program has been implemented.* ["] (Italics added.)

Similarly, 30 CFR 715.11(a) concerning the general obligations un-

¹³ Majority opinion, *supra*, at 272, note 4.

¹⁴ Comment 4, 42 FR 62641 (Dec. 13, 1977).

¹⁵ 42 FR 62677-78 (Dec. 13, 1977). *Cf.*, 30 U.S.C.A. § 1252(e) (West Supp. 1979).

der the general performance standards of Part 715, provides in part:

(a) *Compliance.* All surface coal mining and reclamation operations conducted on lands *where any element of the operations is regulated by a State* shall comply with the initial performance standards of this Part according to the time schedule specified in § 710.11. [¹⁵] [*Italics added.*]

"Operations" in the underlined portion of this regulation refers to the earlier phrase, "All surface coal mining and reclamation operations." It does not, as Patrick suggests, indicate that the proper inquiry is whether a particular operation (N.B.: singular) is regulated by a state.

This interpretation of 30 CFS 715.11(a) is supported by the contents of the comment concerning that section:

4. A few commenters questioned the meaning of the phrase "where any element of the operations is regulated by a State" in 715.11(a). The phrase is rooted in § 502(a) of the Act and is intended to be a general statement of applicability consistent with § 710.11 of these regulations. The performance standards apply to coal mining operations currently regulated by a State under other State or Federal statutes, including the Federal Water Pollution Control Act and State laws governing mining [¹⁶]

Sec. 502(a) of the Act contains the same language as sec. 502(c), "on lands on which such operations are regulated by a State," *i.e.*, on lands under state jurisdiction. *See* note 8, *supra*. A regulation "rooted" in this language does not shift its focus to a particular operation merely by

the substitution, after "lands," of the words "where any element of the operations is regulated by a State" (the phrasing of 30 CFR 715.11(a)) for the words "on which such operations are regulated by a State." Such a slight variation from the wording of sec. 502(c) cannot carry the change in meaning Patrick advocates.

Further, Comment 4 states that the language of sec. 715.11(a) is *intended* to be a general statement of applicability *consistent with* sec. 710.11 of the regulations. As discussed above (*see* notes 7-11 and accompanying text), the Secretary provided that any regulation by a state of surface coal mining operations on lands under its jurisdiction, even if "collateral," *i.e.*, not under a state surface mining control law *eo nomine*, would make the requirements of the initial regulatory program applicable to such operations. If 30 CFR 715.11(a) is intended to be consistent with 30 CFR 710.11(a)—including the requirement of 30 CFR 710.11(a) (3) (ii) that after May 3, 1978, "any person conducting coal mining operations shall comply with the initial regulatory program"—it cannot fairly be read not to require compliance by an operation simply because a state chooses not to apply its law to the operation. The inclusion of the adverb "currently" in the last sentence of Comment 4 above does not vitiate this analysis: the sense of that sentence as a whole is the same as that of the last sentence of Comment 4 on 30 CFR 710.11, *supra* note 11.

The majority's inquiry into

¹⁵ 42 FR 62680 (Dec. 13, 1977).

¹⁶ 42 FR 62642 (Dec. 13, 1977).

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whether the Commonwealth of Kentucky actually regulates coal mining operations incidental to bona fide construction projects is therefore irrelevant. The relevant questions are, does Kentucky regulate surface coal mining on lands under its jurisdiction and does Patrick's project fall within the definition of surface coal mining operations? The answer to both these questions is clearly "yes," as a quick reference to Kentucky Revised Statutes, Chapter 350, and sec. 701 (28) of the Act will confirm.¹⁷

C. *The Statutory Language and Legislative History*

The majority asserts that the language of sec. 502(c) "indicates that the environmental performance standards incorporated into the initial regulatory program should be enforced on lands within the jurisdiction of the various states, but *only* with respect to the surface coal mining operations which are regulated by a state on those lands."¹⁸ (Italics in original.) I cannot agree with this interpretation of that language. I read the same language quite differently. By straightforward parsing of the sentence I read the words "on which such operations" to modify the word "lands." I therefore focus on whether the lands are regulated by a state, not whether operations are. With such a focus my interpretation is that if a state regulates surface coal mining on lands under its

jurisdiction then all surface coal mining operations on those lands are subject to the performance standards of the initial regulatory program. Since the majority's interpretation effectively reads the words "on lands on which such operations are" out of sec. 502(c), I think my interpretation is the sounder statutory construction.

The majority finds support for its interpretation of sec. 502(c) in the paragraph of S. Rep. No. 128, 95th Cong., which is quoted in note 2 of its discussion. I think the majority misunderstands the meaning of the passage. The passage begins with the same language as sec. 502(c), "on lands on which such operations are regulated by a State." This means, the Committee explains, not on lands in Alaska and Arizona, for those states do not regulate surface mining on lands under their jurisdiction, and not on lands under state jurisdiction where the surface effects of underground mining are similarly not regulated by state laws (even though surface mining itself may be). And even though a state does not have a law regulating surface mining or the surface effects of underground mining on lands under its jurisdiction, the Committee adds, it may still join with the Federal Government in administering the interim program if the appropriate state agency certifies it wishes to do so. I fail to see how the fact that the definition of "surface coal mining operations" includes "surface effects of underground coal mining" does anything but confirm the under-

¹⁷ 30 U.S.C.A. § 1291(28) (West Supp. 1979); cf., 30 CFR 700.5, 42 FR 62676-77 (Dec. 13, 1977).

¹⁸ Majority opinion, *supra* at 270.

standing of this passage set forth above. The majority's concern for a meaningful state-lead role in the initial program¹⁹ is allayed by the Senate itself. The Senate report states that the policy of sec. 502(c), as interpreted above, "is entirely consistent with the State-lead philosophy of this legislation."²⁰

My understanding of this passage of the Senate report is supported in an earlier passage. On page 57 of the same report the Committee states:

Since practically all surface coal mining operations covered by the initial regulatory procedure are presently regulated by existing State regulatory authorities (the major exception being operations on federal and Indian lands), it is not the purpose of this interim federal enforcement program to place the Secretary of the Interior in the business of issuing mining permits for operations on lands within the jurisdiction of the States. [²¹]

This indicates that there are only three kinds of lands excluded from the coverage of sec. 502(c): federal lands (regulated in accordance with sec. 523 of the Act); Indian lands (regulated in accordance with sec. 710 of the Act); and lands under state jurisdiction in states which do not regulate surface mining or surface effects of underground mining or both. *Cf.*, note 8, *supra*, and sec. 701(11), 30 U.S.C.A. § 1291(11) (West Supp. 1979), of the Act.

IV. Conclusion

I find the majority's opinion unresponsive to the analysis set forth above. I therefore conclude that the majority's decision is contrary to both the regulations and the statute and respectfully dissent from it.

WILL A. IRWIN,

Chief Administrative Judge.

¹⁹ *Id.*

²⁰ S. Rep. No. 128, 95th Cong., 1st Sess., at 71.

²¹ *Id.*, at 57.

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JOHN MOORE ET AL.

40 IBLA 321

Decided April 30, 1979

Appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications A-060257, etc.

Set aside and remanded.

1. Administrative Procedure: Hearings—Alaska: Native Allotments—Rules of Practice: Hearings

Alaska Natives who allege substantial use and occupancy of vacant, unappropriated, and unreserved public land in Alaska for a period of at least 5 years pursuant to the Act of May 17, 1906, *as amended*, 43 U.S.C. §§ 270-1 to 270-3 (1970), and the regulations at 43 CFR Subpart 2561 are entitled to notice and an opportunity for a hearing prior to rejection of their application. Such notice shall specify the reasons for the proposed rejection. Claimant shall have an opportunity to present evidence and testimony of favorable witnesses at a hearing before the trier of fact prior to a decision.

2. Administrative Procedure: Generally—Alaska: Native Allotments—Contests and Protests: Generally—Hearings—Rules of Practice: Government Contests

Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 *et seq.* Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior,

for assignment of an administrative law judge, who will proceed to schedule a hearing, at which the applicant may produce evidence to establish entitlement to his allotment.

APPEARANCES: Alaska Legal Services Corp., for appellants.

*OPINION BY CHIEF
ADMINISTRATIVE JUDGE
FRISHBERG
INTERIOR BOARD OF
LAND APPEALS*

The appeals which have been consolidated for the purpose of this decision all involve Native allotment applications filed pursuant to the Act of May 17, 1906, *as amended*, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications, sec. 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)), and the implementing regulations at 43 CFR Subpart 2561. The cases are identified in Appendix A attached hereto. All of the applications in the subject cases have been rejected in whole or part because the evidence in the record failed to establish the required use and occupancy. Thus, a common factual issue in all of the cases is the nature and extent of use and occupancy of the land claimed by the applicant.

[1] The Ninth Circuit Court of Appeals has ruled that "Alaska Natives who occupy and use land for at least five years, in the manner specified in the Act and the regulations, * * *" are entitled to due

process in the adjudication of their applications for allotment of that land. *Pence v. Kleppe*, 529 F.2d 135, 141-42 (9th Cir. 1976). The court ruled that due process requires, at a minimum, that

applicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

Pence v. Kleppe, *supra* at 143.

[2] The Board subsequently ruled that the due process requirements set forth in the decision in *Pence v. Kleppe*, *supra*, may be implemented by applying the Departmental contest procedures found in the regulations at 43 CFR 4.451-1 to 4.452-9. In the adjudication of Native allotment applications presenting a factual issue as to the applicant's compliance with the use and occupancy requirements of the statute and implementing regulations,¹ BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application. *Donald Peters*, 26 IBLA

235, 241-242, 83 I.D. 308 (1976), *reaffirmed*, *Donald Peters (On Reconsideration)*, 28 IBLA 153, 83 I.D. 564 (1976).

The Court of Appeals has recently held that application of the Departmental contest procedures to provide the allotment applicant with notice and an opportunity for a hearing prior to adverse action on the allotment application as outlined in the decisions of the Board in *Donald Peters*, *supra*, and *Donald Peters (On Reconsideration)*, *supra*, complies, at least facially, with the due process requirements set forth in the court's mandate in *Pence v. Kleppe*, *supra*. *Pence v. Andrus*, 586 F.2d 733 (9th Cir. 1978).

Accordingly, upon remand of the subject cases BLM should review the case file, including any submissions filed subsequent to the initial decision below. Where it is determined that the application should still be rejected in whole or in part because of the failure of the record to establish applicant's use and occupancy of the land in compliance with the requirements of the statute and regulations, BLM should initiate a contest proceeding in accordance with our decision in *Donald Peters*, *supra*.²

¹ Cases involving issues of fact as to the nature and extent of use and occupancy by the Native claimant may be distinguished from cases where the BLM determines that, assuming the truth of all relevant matters stated in the application, the application must be rejected as a matter of law. In the latter context, an application may be rejected without a hearing, subject to the right of appeal to the Board. *Donald Peters*, *supra* at 241 n. 1; see *Pence v. Andrus*, 586 F.2d 733, 743 (9th Cir. 1978).

² The records disclose that some of the cases involve conflicting State and Native village selection applications filed subsequent to the date the Native allotment applicant's use and occupancy allegedly commenced. Such conflicting applicants should be given notice and an opportunity to participate in any contest proceedings initiated. In the event the BLM after review of the record on remand determines that a Native allotment application should be granted, any conflicting applicant should be given notice and an opportunity to initiate a private contest.

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Several additional issues have been briefed before the Board in certain of the cases. Counsel has briefed the issue of what constitutes use and occupancy in the Native manner, including the question of whether improvements are required and whether allotments can be restricted to the area of the improvements. The Board has held that use and occupancy under the Alaska Native Allotment Act contemplates possession which is at least potentially exclusive of others and not mere intermittent use. *John Nanalook*, 17 IBLA 353 (1974). However, it has been expressly noted that consideration must be afforded to Native customs and mode of living, climate, and the character of the land. Further, permanent improvements as an index of use are not necessarily a prerequisite in appropriate circumstances where the claim is supported by sworn statements of credible witnesses with first hand knowledge of the facts and there are no conflicting adverse claimants. *John Nanalook*, *supra*. In the absence of any evidence of the nature and extent of applicant's use and occupancy which may be introduced at a hearing, it is inappropriate to define further what constitutes qualifying use and occupancy—cases must be decided on an individual basis according to the evidence.

Counsel for some of the allotment applicants has argued that 5 years of use and occupancy is not required. This issue is well settled.

The terms of the statute and the implementing regulation of the Secretary of the Interior both require proof of substantially continuous use and occupancy of the land for a period of 5 years by the applicant, 43 U.S.C. § 270-3 (1970) and 43 CFR 2561.2, without regard to whether the land is within a national forest or part of the unreserved public domain. *See also Medina Flynn*, 23 IBLA 288 (1976); *Paul Koyukuk*, 22 IBLA 247 (1975); *Heldina Eluska*, 21 IBLA 292 (1975); *Warner Bergman*, 21 IBLA 173 (1975).

An allotment right is personal to one who has fully complied with the law and the regulations, and a Native may not tack on parental or ancestral use and occupancy to establish that right. *Sarah F. Lindgren*, 23 IBLA 174 (1975); *Lula J. Young*, 21 IBLA 207 (1975). Substantial use and occupancy as contemplated by the Act must be by the Native as an independent citizen for himself and not as a minor child using the land in the company of his parents. *Natalia Wassilliey*, 17 IBLA 348 (1974). Whether an applicant's use and occupancy is sufficiently independent to qualify can best be determined after relevant evidence is elicited at the hearing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases remanded for further

proceedings consistent with this decision.

NEWTON FRISHBERG,
Chief Administrative Judge.

WE CONCUR:

JAMES L. BURSKI,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

APPENDIX A

- 70-526: MOORE, John—A-060257
75-6: BOGEYAKTUK, Anatole—F-12783
75-77B: KICHOK, Farmer—AA-7181
75-392: AYOJIAK, Moses—AA-6297
75-400: SINKA, Cecilia—F-18167
75-423: GREGORY, Gabby A.—AA-6277
75-430: CARLO, Kenneth J.—F-14016
75-438: LINUS, Kathleen—F-14264
75-447: (a) EVAN, Elena—A-056034
(b) BAVILLA, Evan—AA-6623
(c) ATAKITLIG, Olia P.—AA-7402
(d) NELSON, Eleanor—AA-7704
(e) NANALOOK, Moses—AA-7978
75-462: (a) COOPCHIAK, John—AA-6355
(b) BAVILLA, Anuska—AA-7404
(c) FULLMOON, Sam—AA-7410
(d) KRITZ, Anecia—AA-7442
75-469: NANALOOK, Emma—AA-7322
75-471: NELSON, JR., Alex—AA-7715
75-472: EVAN, Carl L.—A-056064
75-474: NECK, Lloyd—AA-7416
75-475: ANDREWS (HAWK-INS), Rosalind M.—F-16234
75-477: WHYMN, Pavilla—AA-7057
75-478: MATSON, Lena—AA-7940
75-481: NICK, Willie—AA-7420
75-482: WASSILLIE, Andrew—AA-6723
75-484: LUKE, Gladys—F-14724
75-495: PEDERSEN, Alvin N.—AA-5984
75-497: KANULIE, Mary—AA-7441
75-498: WALLIS, Marguerite Roehl—AA-7241
75-501: TITUS, Dorothy—F-14538
75-502: (a) MILLER, Fred—F-17742
(b) SNOW, JR., Peter—F-17788
(c) ANDERSON, Dorothy A.—F-18974
75-520C: MYOMICK, Flora—F-16239
75-521: SHARP, Ferdinand—AA-7423
75-533: PETE, Agatha—F-16390
75-534: MONSEN, Annie—AA-7907
75-540: BARTMAN, Gust—A-055105
75-541: BLUE, Robert T.—AA-6353

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- 75-543: ESAI, Esai—F-17180
 75-544: ESAI, SR., Bobby—F-17520
 75-545: ELUSKA, Steve—F-16051
 75-546: SNOW, Evelyn—F-17792
 75-547: JOHN, Mary—F-17768
 75-548: ANDREWS, Heldina—F-17638
 75-549: NICKOLI, Nickiti—A-056300
 75-552: WASKEY, Agafia—AA-7186
 75-553: AYOJIAK, Willie—AA-6350
 75-555: WILLIAMS, Edison—F-14286
 75-560: SNOWBALL, Mark—F-16400
 75-561: RAYMOND, Adam J.—F-16397
 75-591: PETE, Daisy—F-16392
 75-598: ACOMAN, Clyde W.—F-16412
 75-599: OTTEN, SR., Ambrose A.—F-18431
 75-600: ALEXIA, Bernie—F-17870
 75-612: ESAI, Minnie Dora—F-17521
 75-613: ATCHAK, Archie B.—F-16413
 75-624: APOSIK, Adam D.—AA-7452
 75-651: KINIKALK, Evan—AA-7967
 75-663C: PAVIAN, Henry—AA-7266
 76-48: ANDERSON, Alburn A.—F-16287
 76-49: ESAI, Pauline Dennis—F-17522
 76-66: SMITH, Freda W.—F-18383
 76-86: OLICK, Ignaty—F-17075
 76-129: ODOMIN, SR., Nick—AA-6004
 76-130: PETER, Lena—F-034711
 76-135: OPOKEDAK, Stephanita—AA-6374
 76-149: REFT, JR., Gust J.—AA-7475
 76-151: NICKOLAI, Murphy—A-059290
 76-156: GAMECHUCK, Billie—A-056042
 76-157: ANDERSON, Ralph S.—F-18305
 76-158: SAM, Elma—F-14323
 76-177: WASULI, Sando—F-16411
 76-197: SHOWALTER, James R.—F-15467
 76-201: CHYTHLOOK, Molly B.—AA-7281
 76-223: BLUE, Agnes—F-15241
 76-224: HOELSCHER, Agnes T.—F-16142
 76-225: ALFRED, Blanche—F-17054
 76-226: FRANK, Henry—F-17061
 76-228: BOBBY, Nick—F-16491
 76-229: EVAN, Nastasia—F-16494
 76-231: WASSILLIE, Mary—AA-6268
 76-232: TRIPLETT, Elena A.—F-17222
 76-233: MANN, David—F-17215
 76-235: FERRIS, Jean F.—F-16225
 76-236: ROMER, Mary F.—F-18203
 76-239: NICK, Cecelia—F-19199
 76-250: ODINZOFF, Joseph E.—F-16387
 76-253: LOCKWOOD, James—F-18301

- 76-254: SNOWBALL, SR., Timothy—F-16045
76-255: NEWMAN, Florence—F-12611
76-256: GUSTY, Alice—F-16495
76-257: MIKE, Gregory—AA-6262
76-261: CHARLES, Della—F-15898
76-262: TUGATUK, Wassillie—AA-7215
76-267: JAMES, Lillian—F-14789
76-273: KAWAGLEY, Mary Alice—F-16148
76-275: PETE, Elias—F-16393
76-307: TRITT, Lincoln—F-18450
76-308: ZAUKAR, Marvara—F-16497
76-310: GILBERT, Trimble—F-12606
76-318: WELLS, Walter—F-18822
76-322: JACK, Helen A.—F-16377
76-323: WILLIE, Katherine R.—F-16049
76-335: TRITT, Franklin—F-17443
76-367: WASHINGTON, Oswald J.—F-16409
76-374: GILBERT, Mary—F-12607
76-375: GOODWIN, Pearl Out-Water—F-17980
76-379: BIDDLE, Doris Begay—F-14711
76-389: FOXIE, Cecilia—F-18751
76-390: McCARR, Walla—AA-7183
76-399: NERBY, JR., John O.—F-16154
76-400: NICHOLAS, SR., Wilbert—F-15950
76-406: EDWARDS, Jimmie—F-14319
76-409—ABSTON, Regina C.—AA-7316
76-410: ROCK, Bertha—F-13859
76-412: WOODFORD, Ralph—F-15480
76-415: MATHLAW, SR., Rex—F-18463
76-425: KUSEGTA, Gus—A-05510
76-427: SULLIVAN, Larry—AA-7876
76-436: LINDGREN, SR., Benjamin P.—AA-8235
76-437: WASKA, George—F-18285
76-438: WILLIAMS, George E.—A-061299
76-444: (a) BERGMAN, Grafton L.—F-13520
(b) ENGLISHOE, Ronald S.—F-13836
(c) WILLIAMS, Mark H.—F-14735
76-445: REED, Tommy—F-17939
76-446: ARSENTI, Willie—AA-7380
76-457: GRIEST, Oscar A.—F-18004
76-472: TENAS, Charley—A-053876
76-475: LARSON, Mary S.—AA-7688
76-477: MALUTIN, Lydia—AA-7312
76-479: JOHN, Vonga—F-14293
76-485: EDWIN, Issac S.—F-027065
76-492: ALOYSIUS, SR., Jake—F-022857
76-493: MALUTIN, JR., Herman—AA-7310
76-494: MALUTIN, Jessie J.—AA-7311
76-504: GLOKO, Andrewski—AA-7213

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- 76-519: AGA, Alberta E.—AA-7395
 76-520: BUTLER, Shirley A.—F-15539
 76-523: KAPATAK, Tantania—AA-7662
 76-543: LEAVITT, Judy M.—F-13671
 76-578: WASKA, Peter—F-13269
 76-688: PANNINGONA, Dorothy—F-17781
 77-6: JAMES, George—AA-7741
 77-32: STEPANOFF, Walter—AA-5980
 77-33: KITCHOK, Nick—AA-7599
 77-34: WASSILLIE, Wassillie—AA-6301
 77-35: HERRMAN, Gerald L.—AA-6283
 77-277: PANRUK, David—F-17818
 77-279: TIRCHICK, Peter F.—F-17821
 77-326: BUNYAN, Gertrude M.—F-14690

APPEAL OF RAYMOND E. MILLER**3 ANCAB 238***Decided May 14, 1979*

Appeal from a decision of the Bureau of Land Management AA-6701-D, 43 FR 14542 (Apr. 6, 1978).

Reversed and remanded.

1. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

An open-to-entry lease issued under A.S. 38.05.077, including any associated right

to purchase the leased land granted by State statute, is protected as a valid existing right under ANCSA, and the leasehold must be excluded from any conveyance to a Native corporation under ANCSA.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Reconsideration

Where a person received no notice of a decision affecting his open-to-entry lease, and where the Secretary has reconsidered and reversed the Board's ruling on valid existing rights in an appeal from that decision, the Board considers these circumstances extraordinary within the meaning of 43 CFR 4.21(c) and will reconsider its ruling.

APPEARANCES: Charles R. Tunley, Esq., on behalf of Appellant, Raymond E. Miller; M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

*OPINION BY**ALASKA NATIVE CLAIMS**APPEAL BOARD***SUMMARY OF APPEAL**

This appeal involves the issue of whether an open-to-entry lease, issued by the State of Alaska before enactment of ANCSA, including associated rights to purchase the leased land, is protected from Native selection as a valid existing right under ANCSA. A related question is the effect of Secretarial Order 3029, regarding valid existing rights, on the Board's previous rulings on this point and on this appeal.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1627 (1976), and the implementing regulations in 43 CFR Part 2650, and Part 4, Subpart J (1977), hereby makes the following findings, conclusions and decision reversing the decision of the Bureau of Land Management AA-6701-D, 43 FR 14542 (Apr. 6, 1978).

Mr. Miller appeals a decision of the Bureau of Land Management (BLM) published Apr. 6, 1978, covering land selections under the Alaska Native Claims Settlement Act (85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1627 (1976)) (hereinafter ANCSA) by Seldovia Native Association, Inc. (AA-6701-B and AA-6701-D), and under the Alaska Statehood Act (72 Stat. 339 (1958), hereinafter Statehood Act) by the State of Alaska (A-050903).

BLM previously adjudicated the same land selections in a decision dated Oct. 6, 1975, on the State's selection A-050903, and in a second decision dated Oct. 9, 1975, on Seldovia's selections AA-6701-B and AA-6701-D. The two decisions were not published in the *Federal Register* or in a newspaper. Both decisions were timely appealed to the Board. Docketed respectively as ANCAB VLS 75-14 and VLS 75-15, they were consolidated for decision and, after extensive briefing, were decided June 9, 1977. The

issues involved the status, as valid existing rights under ANCSA, of third-party interests created by the State on lands tentatively approved for selection under the Statehood Act, and then approved for conveyance to Seldovia Native Association under ANCSA. The Board found that valid existing rights protected under ANCSA must be identified in a BLM decision to convey lands, and that open-to-entry leases issued by the State of Alaska were protected as valid existing rights by § 14(g) of ANCSA. However, the Board also found that the right to purchase the leased lands, associated with the lease, was not protected under § 14(g) because it was an interest leading to fee title, and was not protected under § 22(b) of ANCSA because it was a State-created interest. The appeal was remanded to BLM for action consistent with the decision.

On Apr. 6, 1978, BLM published a new decision, reflecting action on the remand, in the *Federal Register*. (43 FR 14542 (1978).) All lands covered by this April 1978 decision were previously included in the decisions of October 1975.

However, the 1978 decision included the following findings, not a part of the 1975 decisions:

(It should be noted that lands covered by open-to-entry leases identified as ADL Nos. 29454, 41005, 41084, 41085, 41425, 41553, 41704, 41862, 42389, 42909, 42954, 44546, 45000, 45373, 47021, 47164, 51665, 55132, 55137, 55138, and 55210 were excluded from the selection application filed by Seldovia Native Association, Inc.

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Regulation 43 CFR 2651.4(b) provides that:

"* * * Selections shall be * * * reasonably compact * * *. The total area selected will not be considered to be reasonably compact if (1) it excludes other lands available for selection within its exterior boundaries; or (2) lands which are similar in character to the village site or lands ordinarily used by the village inhabitants are disregarded in the selection process; or (3) an isolated tract of public land of less than 1,280 acres remains after selection."

The selection as filed does not meet the requirements for compactness as required by section 12(a)(2) of ANCSA and the regulation given above. Therefore, the lands excluded by Seldovia Native Association, Inc., are considered selected in order that the requirements for compactness are met.)

[Italics added.]

BLM included in the 1978 decision a standard appeals paragraph stating that the decision could be appealed to the Board. Appellant, Raymond Miller, holder of an open-to-entry lease ADL #41005, excluded from selection by Seldovia but included by BLM because of requirements for compactness and contiguity, timely filed the present appeal.

It is evident from the record, and undisputed by the parties, that while all lands covered by the BLM decisions of April 1978, were previously included in the decisions of October 1975, Mr. Miller's open-to-entry lease was identified for the first time in the 1978 decision. Further, because Mr. Miller's lease was not included in a listing of third-party interests provided to BLM by

the State of Alaska at the time of the 1975 decisions and resulting appeals, neither BLM nor the Board notified Mr. Miller of the earlier decisions or of his appeal rights.

STATUS OF OPEN-TO-ENTRY LEASE AS VALID EXIST- ING RIGHT

The Statehood Act granted to the newly-created State the right to select approximately one hundred and three million acres of land and authorized the State to execute conditional leases and conditional sales of selected lands, after tentative approval of the selection but before issuance of patent. (72 Stat. 339 *et seq.* (1958).)

The State issued "open-to-entry" leases under a statutory program to provide individuals with small tracts of recreational land. (A.S. 38.05.077.) If the State has tentative approval for its selection of the land, and the land has been surveyed, the lessee may relinquish his lease and acquire patent to the entry by negotiated purchase.

The leasehold interest is clearly protected as a valid existing right under § 14(g) of ANCSA, which provides:

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent

shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. * * *

The issue is whether the lessee's right to purchase the land is also protected by ANCSA, and, if so, how it is protected in the conveyance procedures followed by BLM.

The Board has ruled that the right to purchase associated with an open-to-entry lease is not protected as a valid existing right under ANCSA. The Board held:

* * * all copies of open-to-entry leases in the record * * * are identical and * * * do not contain provisions to purchase the leased land. The leases provide only for renewal upon the expiration of the five-year term and for removal or disposal by sale of any improvements placed on the leasehold by the lessee upon termination of the lease. Therefore, while § 14(g) specifically provides that a patent issued under ANCSA shall be "subject to the lease * * * and the right of the lessee * * * to the complete enjoyment of all rights, privileges, and benefits thereby granted to him," the right of purchase asserted under A.S. 38.05.077 is not granted by the lease, but appears to be, rather an associated preference right granted in connection with the leasing program to individuals holding such leases.

Further, the asserted right to purchase lands held under an open-to-entry lease can be exercised under the State statutes only if the lease is relinquished. The relinquishment of the lease and subsequent issuance of patent would constitute a new interest created subsequently to ANCSA, contrary to § 11(a)(2) which specifically withdraws lands TA'd to the State "from

the creation of third party interests * * * under the Alaska Statehood Act."

Finally, under ANCSA, the selecting Native Corporations will receive title to certain lands previously TA'd to the State of Alaska. Therefore, as to such lands, the State may not extend a preference right to purchase lands to which a Native Corporation, rather than the State, will hold title. Although a Native Corporation, succeeding under § 14(g) to the interest of the State as lessor may wish to sell the leased land to the lessee, the Board finds no mechanism in ANCSA for the enforcement of such a right in the lessee against a Native patentee.

(*Appeal of State of Alaska and Appeal of Seldovia Native Association, Inc.*, 2 ANCAB 1, 61-62, 84 I.D. 349, 376-377 (1977) [VLS 75-14/75-15].)

The Board has also previously reached the conclusion that ANCSA protects, as "valid existing rights," only those rights which do not lead to acquisition of a fee title. The Board ruled, in *Appeal of Eklutna, Inc.*, 1 ANCAB 190, 83 I.D. 619 (1976) [VLS 75-10], that rights leading to acquisition of title were excluded from conveyance to the selecting Native corporation under § 22(b) of ANCSA, while interests of a more limited nature were protected by § 14(g) of ANCSA as valid existing rights to which the conveyance was made subject.

The Secretary of the Interior, however, has adopted a different position which overrules and binds the Board. Secretarial Order 3029, 43 FR 55287 (Nov. 27, 1978), which modified an earlier Secretarial Order on the same subject, states:

Sec. 2 *Policy*. By this Order I hereby adopt the Memorandum from the Solicitor

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tor, dated October 24, 1978, (copy attached), as the position of the Department on the subject of valid existing rights under ANCSA. I reaffirm my conclusion in Order 3016 that, if prior to the passage of ANCSA, lands which were tentatively approved for selection by the State of Alaska were * * * (b) patented or leased by the State with an option to buy under Alaska Statue [sic] 38.05.077 (the so-called "open-to-entry" program); then valid existing rights were created within the meaning of ANCSA. I also now conclude that lands covered by such open-to-entry leases from the State should not be included in conveyances to Native corporations. The Bureau of Land Management should identify third party interests created by the State, as reflected by the land record of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department should not adjudicate these interests. This Order is not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official [sic].

* * *

The Solicitor's Memorandum of Oct. 24, 1978, concluded that lands tentatively approved for State selection, located within the area withdrawn for Native selection by § 11(a)(2) of ANCSA, were not available for conveyance to selecting Native corporations *if*, prior to enactment of ANCSA, such lands were leased with an option to buy by the State to individuals under the State's "open-to-entry" program. The Solicitor also concluded that open-to-entry leases are valid existing rights and should be ex-

cluded from the conveyance to Natives.

A fundamental principle of ANCSA is that "[a]ll conveyances made pursuant to this Act shall be subject to valid existing rights." In addition, the sections withdrawing land for Native selection (Sections 11(a), 16(a)) expressly provide that the withdrawal is "subject to valid existing rights." * * *

Although the phrase "valid existing rights" is not specifically defined in Section 3 "Definitions", both the statute and the legislative history offer guidance as to its meaning.

Section 14(g) provides in pertinent part:

"Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement [sic] (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued * * * the patent shall contain provisions making it subject to the lease, contract (etc.) * * *."

Section 22(b) directs the Secretary "to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites or small tract sites, and who have fulfilled all the requirements of law prerequisite to obtaining a patent."

Section 22(c) protects persons who have initiated valid mining claims or locations in their possessory rights if they have met the requirements of the mining laws.

By regulation the Department has construed Sections 14(g) and 22(b) and provided the mechanism for implementing them. 43 CFR 2650.3-1(a) provides:

"Pursuant to sections 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entry or entries which have been perfected under, or are being maintained in compliance

with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under section 6(g) of the Alaska Statehood Act), contracts, permits rights-or-way [sic], or easements."

This regulation makes a basic distinction between rights "leading to acquisition of title" and "right of a temporary nature." The former are excluded from the conveyance, the latter are included, but protected for the duration of the interest.

It has been argued that for those rights which lead to the acquisition of title the statute and the regulations also distinguish rights which are created under Federal law an [sic] those created by State law, protecting only the former. I do not agree for several reasons.

First, the authority of the State to create third party interests in tentatively approved (T.A.'d) lands comes from section 6(g) of the Statehood Act, quoted in pertinent part above. Although the State has exercised this authority through State legislation which defines the terms on which persons may acquire leases, etc., the Congress, in ANCSA, clearly considered such leases to be issued under Federal law, namely the Statehood Act. Section 11(a)(2), for example, withdraws T.A.'d land "from the creation of third party interests by the State under the Alaska Statehood Act." Section 14(g), as already stated, refers to leases "issued under section 6(g) of the Alaska Statehood Act."

Therefore, it is appropriate that 43 CFR 2650.3-1(a) does not limit its scope to entries which are maintained under *Federal laws* and lead to the acquisition of title, but says simply "laws leading to the acquisition of title."

Second, I do not believe the listing of the rights to be protected was intended to be limiting, but rather was *ejeusdem*

generis. The regulation already quoted (43 CFR 2650.3-1(a)) precedes its list with "such as those created by * * *," indicating clearly that the list is not exhaustive. Furthermore, there is not longical [sic] reason why Congress would have intended to protect rights of * * * individuals which lead to the acquisition of title under such Federal laws as the Townsite Act or the Homestead Act, but did not intend to protect the same * * * individual when the law under which the rights are being perfected is a State law.

It is my conclusion, therefore, that the department's regulations have construed "valid existing rights" under ANCSA to include rights perfected or maintained under State as well as Federal laws leading to the acquisition of title.

This conclusion is reinforced by the provisions of Section 11(a)(2) which provides that the withdrawal of State selected and T.A.'d lands is from "all forms of appropriation under the public land laws, including the mining the minerala [sic] leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act." The italicized language reveals that third party interests created by the State are considered to have been created "under" the Statehood Act, which is a Federal statute. Also by withdrawing the land from the future creation of third party interests by the State, there is a strong implication that third party interests already created were considered "valid existing rights." Finally, the fact that the lands are withdrawn" from appropriations under the mining laws makes it clear that "valid existing rights" as used in Section 11(a)(2) contemplates rights which lead to the acquisition of title as well as those of a temporary nature.

[Footnotes omitted. Italics in original. 43 FR 55288-89 (Nov. 27, 1978).]

[1] In accordance with this clearly expressed Secretarial inter-

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pretation of Departmental regulations, the Board reverses its former position and finds that an open-to-entry lease issued under A.S. 38.05.077, including any associated right to purchase the leased land granted by State statute, is protected as a valid existing right under ANCSA, and the leasehold must be excluded from any conveyance to a Native corporation under ANCSA.

EFFECT OF PRIOR DECISION ON ADJUDICATION OF APPELLANT'S RIGHT

The Board in *Appeal of State of Alaska* and *Appeal of Seldovia Native Association, Inc.*, *supra*, adjudicated the conveyance covering all lands included in the April 1978 decision which is appealed by Mr. Miller. However, it is undisputed that Mr. Miller received neither actual nor constructive notice of the decisions to convey which were appealed and docketed as VLS 75-14 and VLS 75-15. Those decisions were not published in the *Federal Register* or any newspaper. As Mr. Miller's open-to-entry lease was not included in a listing of State-created third-party interests provided to BLM by the State of Alaska, neither BLM nor the Board notified Mr. Miller of the decisions or his appeal rights. Mr. Miller's first notice of a conveyance which might affect his open-to-entry lease came with BLM's publication of the April 1978 decision, which specifi-

cally listed Mr. Miller's lease, ADL # 41005 as an interest excluded from selection by Seldovia Native Association, Inc., but considered selected by BLM for reasons of compactness and contiguity.

[2] Conveyances to Seldovia Native Association, Inc., were among the earliest processed by BLM and current publication and notice requirements had not then been adopted. Regulations in 43 CFR 4.21(c) permit the Board to reconsider a decision in extraordinary circumstances. Where a person received no notice of a decision affecting his open-to-entry lease, and where the Secretary has reconsidered and reversed the Board's ruling on valid existing rights in an appeal from that decision, the Board considers these circumstances extraordinary within the meaning of 43 CFR 4.21(c) and will reconsider its ruling. Therefore, the Board treats Mr. Miller's appeal as a request for reconsideration of its decision in ANCAB VLS 75-14 and VLS 75-15, and grants such request insofar as that decision affects Mr. Miller's open-to-entry lease.

The Board finds that Mr. Miller's open-to-entry lease, ADL #41005, is a valid existing right protected under ANCSA; that such protection applies not only to the lease but to any associated right of purchase; and that the lease must therefore be excluded from the conveyance to Seldovia Native Association, Inc.

The decision of the Bureau of Land Management here appealed is reversed to the following limited extent: (1) rejection of the State of Alaska's selection A-050903 is reversed insofar as it includes lease ADL #41005; (2) inclusion of lease ADL #41005 in the conveyance of land to Seldovia Native Association, Inc., is reversed.

The Bureau of Land Management is hereby directed to take action consistent with this decision.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

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FEDERAL LAND POLICY AND MANAGEMENT ACT'S EFFECT
ON THE RIGHT-OF-WAY APPLICATION FOR THE MIDDLE FORK
RESERVOIR ON THE POWER RIVER, WYOMING
January 12, 1979

FEDERAL LAND POLICY AND MANAGEMENT ACT'S EFFECT ON THE RIGHT-OF-WAY APPLICATION FOR THE MIDDLE FORK RESERVOIR ON THE POWDER RIVER, WYOMING*

Rights-of-Way: Federal Land Policy and Management Act of 1976—

Rights-of-Way: Applications

Given the specific facts presented by the right-of-way application, where the use of a large percentage (71%–89%) of the reservoir water is not known, the Secretary cannot make an "informed decision" on the application, as required by Title V of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743 (Oct. 21, 1976), 43 U.S.C. § 1761 *et seq.* (1976) (FLPMA), and therefore may not proceed to consider the application.

The apparent discretion granted to the Secretary in section 1761 of FLPMA which states that the Secretary shall require such information "which he deems necessary" to grant a right-of-way must be interpreted in light of sec. 1764's specific mandate to submit a plan of operation, sec. 1765's specific mandate to include protective terms and conditions, and Congress' reference to "the use, or intended use" of the right-of-way. Therefore, information about the intended use—as opposed to possible uses—of the water is necessary to the Secretary's decision whether to grant the application, under the circumstances presented by this case.

Rights-of-Way: Applications—Rights-of-Way: Conditions and Limitations—Regulations: Generally

The Secretary could establish general policy in right-of-way regulations which would provide specific guidelines for determining how much uncertainty about use will prevent the processing of right-of-way applications.

M-36900

January 12, 1979

OPINION BY

OFFICE OF THE SOLICITOR

MEMORANDUM

To: DIRECTOR, BUREAU OF LAND MANAGEMENT

FROM: SOLICITOR

SUBJECT: FEDERAL LAND POLICY AND MANAGEMENT ACT'S EFFECT ON THE RIGHT-OF-WAY APPLICATION FOR THE MIDDLE FORK RESERVOIR ON THE POWDER RIVER, WYOMING

ISSUE:

Must an applicant for a right-of-way to store water on the public lands under Title V of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2776 (Oct. 21, 1976), 43 U.S.C. § 1761 *et seq.* (1976) (FLPMA) disclose the place of use and use to which that water will be put before a decision can be made on that right-of-way?

SUMMARY OF RESPONSE:

Yes. Given the almost complete lack of information and uncertainty regarding the intended use of al-

*Not in Chronological Order.

most all this water, the fact that it may be used in ways whose impacts are now unknown or ill-understood, and the fact that the permittee may not decide for many years how to use the water, I hold that, on these facts, the Secretary must know the intended use(s) of the bulk of the water before acting on a right-of-way application to store water on the public lands.

BACKGROUND:

The Powder River Reservoir Corp. proposes to construct an earthfill dam which would create a 50,000-acre-foot reservoir on the Middle Fork of the Powder River. The proposed reservoir would generate approximately 25,000 acre-feet of water for use, and would inundate 1,160 acres of land. Of this, 141 acres are public lands. The reservoir corporation applied to the Bureau of Land Management for a right-of-way to inundate this public land on July 16, 1973. While the application was pending, Congress enacted FLPMA, Subchapter V of which establishes new requirements for right-of-way grants.

This memorandum analyzes how this application must be treated under FLPMA. It clarifies and supercedes the earlier opinion of the Deputy Solicitor on this subject, dated Sept. 12, 1977. Because of the important and difficult question involved, I have carefully reviewed the matter.

The applicant corporation is composed of 22 ranchers. Through a contract between it and Carter Oil Co. (Carter), a subsidiary of Ex-

xon, Carter has complete control of 25,000 acre-feet, or a minimum of 71 percent of the designated water use.¹ Carter has contracted to sell half its water entitlement to Atlantic Richfield Co. (ARCO).

Under the terms of the contract, the reservoir corporation will use the balance of the water for agricultural purposes. This will amount to, on the average, 6,640 acre-feet or 18 percent of the designated water use.²

The Bureau of Land Management requested information from Carter and ARCO on intended water use. Carter has responded: "As we have consistently advised you, we have no firm and definite plans [for use of the water] to disclose. That has been the case and is still the case."³ Similarly, ARCO has informed BLM: "Atlantic Richfield cannot commit to an immediate use of water from the Middle Fork Reservoir * * *"⁴

¹ Carter also has responsibility for over half of the operation and maintenance costs.

² The permitted contract range is 3,700 acre-feet (10.57%) to 10,000 acre-feet (28.57%).

³ July 26, 1977 letter to BLM Wyoming State Director from Carter's President. Carter justifies its lack of specific plans for the use of the Middle Fork Reservoir water by explaining that Middle Fork is simply a prudent business investment. Its July 26 letter frankly concedes: "[We consider] the purchase of the water from the Middle Fork reservoir on a take-or-pay basis as desirable and prudent from a business standpoint for the same reason that we had for acquiring coal reserves and for our increasingly large commitments to coal synthetics research. Specifically, it is part of our plan to be in position with the necessary raw materials and technology for entry into coal synthetics whenever entry is, in our opinion, commercially desirable."

⁴ July 21, 1977 letter to BLM Wyoming State Director from ARCO's Division Manager. ARCO's letter also speaks of possible use of the water in plants to make synthetic fuels from coal.

A draft environmental impact statement (EIS), pursuant to the National Environmental Policy Act, 42 U.S.C. § 4231 *et seq.* (1976) (NEPA), has been prepared on the right-of-way application, but no final EIS has been prepared. I am informed that a hypothetical coal gasification plant was the only use of this water analyzed therein, although other possible uses come to mind, such as coal liquefaction, coal slurry pipelines, or coal-fired electrical generating plants.

DISCUSSION:

The principal question for decision is whether this information from Carter and ARCO represents sufficient compliance with FLPMA to enable the Secretary to decide whether to grant the right-of-way request.

FLPMA at 43 U.S.C. § 1764(j) (1976) states:

The Secretary concerned shall grant, issue, or renew a right-of-way under this subchapter *only* when he is satisfied that the applicant has the technical and financial capability to construct the project for which the right-of-way is requested, and *in accord with the requirements of this subchapter.* [Italics added]

One of the important requirements of this subchapter is the duty of the applicant, upon request, to disclose certain information. Sec. 501(b) of FLPMA, 43 U.S.C. § 1761(b) (1) (1976) provides:

The Secretary concerned shall require, prior to granting, issuing, or renewing a right-of-way, that the applicant submit

and disclose those plans, contracts, agreements, or other information reasonably related to the use, or intended use, of the right-of-way, including its effect on competition, which he deems necessary to a determination, in accordance with the provisions of this Act, as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions which should be included in the right-of-way.

43 U.S.C. § 1761(b) also addresses itself to disclosure and consideration of the real party in interest.⁵ There seems to be little doubt, given their majority interest in the water and their principal financial responsibility, that Carter and ARCO are real parties in interest.

Under 43 U.S.C. § 1764(d) (1976), the Secretary shall require the applicant:

prior to granting or issuing a right-of-way pursuant to this subchapter for a new project which may have a significant impact on the environment, * * * to submit a plan of construction, operation, * * * for such right-of-way which shall comply with stipulations or with regulations issued by [the] Secretary, including the terms and conditions required under section 1765 of this title.

Sec. 1765 requires each right-of-way to contain terms and conditions which will, *inter alia*:

minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; * * * require compliance with applicable air

⁵ For example, § 1761(b)(2) directs the Secretary to require the applicant to disclose "the identity of the participants in the entity, when he deems it necessary to a determination, * * * as to whether a right-of-way should be granted, * * *."

and water quality standards established by or pursuant to applicable Federal or State law.

Sec. 1765 also requires inclusion of such terms and conditions as the Secretary deems necessary to:

protect Federal property and economic interests; * * * protect the other lawful users of the lands adjacent to or traversed by such right-of-way; * * * protect lives and property; * * * protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area of subsistence purposes; * * *

It is clear from all these requirements that the Secretary has an important responsibility in issuing public land rights-of-way. Among other things, his general responsibility, as illuminated by the Senate Committee Report on the bill which became FLPMA, is to determine whether the right-of-way is "in the public interest and * * * meets the requirements of Title [V]." S. Rep. No. 583, 94th Cong., 1st Sess. 66 (1975). Congress specifically instructed the Secretary to require advance submission of a plan of construction and operation for new projects which could significantly affect the environment, (*id.*, § 1764(d)); mandated that terms and conditions adequate to protect the public interest in several specific respects be included (*id.*, § 1765(a)); and vested the Secretary with near-plenary power to require the applicant to make all disclosures and commitments the Secretary deems necessary to his decision whether issuance is in the

public interest, (*id.* § 1761(b)(1)). Taken as a whole, Title V fairly bristles with specific procedures which the Secretary must follow and specific responsibilities which he must discharge.

There is no doubt that the Secretary could require the oil companies here to disclose their plans for the use of this water and, failing that, to reject the right-of-way application. Sec. 501(b)(1) authorizes the Secretary to require such information "reasonably related to the use, or intended use, of the right-of-way, * * * which he deems necessary" to make a decision on the application. The use of the water which would inundate the public lands is clearly "reasonably related to" the use of the right-of-way, and can easily be deemed relevant to the decision. It is also clear that the Secretary can adopt this requirement generally in regulations issued under Title V,⁶ or impose it on a case-by-case basis.

In a narrow sense, the "use" of this right-of-way across the public lands is only for storage of water, and an adequate EIS would inform the Secretary of the impact of that use on those public lands inundated. The question here is whether the use of that water stored partially on public lands need be disclosed. This is logically and intimately related to the storage of water, because the water stored in this reservoir—where flood control is not a purpose—is principally to be used

⁶ FLPMA's § 310, 43 U.S.C. § 1740, gives the Secretary broad authority to issue regulations to carry out the Act.

elsewhere to facilitate industrial, agricultural or other new, unknown development. Indeed, Carter and ARCO's letters concede this point. The matters which remain unanswered are where the water is to be used and how it is to be used.

Sec. 504(d) requires applicants for projects which may have a significant environmental impact to submit in advance of decision a plan which covers, among other things, *operation* of the right-of-way. The initial question is whether "operation" of the right-of-way includes those off-site operations made possible by the storage of water in the reservoir. It would seem obvious that it does, since the reservoir is for the purpose of supplying water for industrial or other facilities or developments which may or may not be adjacent to the right-of-way (the reservoir) itself. The logical chain of storage supply and use is direct.

Support for this conclusion is also found in that part of sec. 501(b)(1), 43 U.S.C. § 1761(b)(1) (1976), which authorizes the Secretary to require the applicant to supply information "*reasonably related to the use, or intended use*" (italics added) of the right-of-way, as opposed to information about the use itself. Here it seems obvious that the use of the water stored on the right-of-way bears a reasonable relation to the use of the right-of-way itself (to store the water). Support is also found in that part of sec. 501(b)

which authorizes the Secretary to require information about the right-of-way's effect on "competition," which in this context is determined by the use of this stored water in an arid region where water for agricultural and industrial use is scarce. Sec. 504(a), 43 U.S.C. § 1764(a) (1976), also refers to the "project for which the right-of-way is issued." Although the context in which this language is used refers to the right-of-way ground occupied by project facilities, here we have a right-of-way application whose sole reason for existence is to make possible a project elsewhere. In these circumstances "project" may logically be read to include the total project made possible by the right-of-way.

However, FLPMA's sec. 505(b)(vi), 43 U.S.C. § 1765(b)(vi) (1976), authorizes (but does not require) the Secretary to include such terms and conditions as he deems necessary, *inter alia*, to "protect the public interest in the *lands traversed by the right-of-way or adjacent thereto*." (Italics added.) From this, it might be argued that the Secretary is not authorized to include conditions regulating uses not on or adjacent to the right-of-way.

The short answer to this is found in sec. 505(a), which describes terms and conditions that *must* be included in the right-of-way (as opposed to 505(b)'s permissive terms and conditions), but which is *not* limited to conditions necessary to

protect the public lands traversed by the right-of-way. These mandatory terms are broadly expressed; e.g., "to minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the environment," and are not limited to damage to the right-of-way itself. This contrast between 505(a) and 505(b) is telling.

It is clear from another perspective that the Secretary cannot blind himself to the use to which the water would be put. NEPA requires that a decision on a project which has a significant environmental impact must be preceded by an environmental impact statement. The environmental impacts of this water storage project include the use to which the water will be put, which necessarily means these uses must be considered in making a decision on the project. The NEPA cases are legion on this point. *See e.g., Alaska v. Andrus*, 580 F.2d 465 (D.C. Cir., Feb. 24, 1978), partially vacated on other grounds, — U.S. — (1978), where the Court emphasized that one of NEPA's "most important functions" is the "affirmative obligation" it places on agencies to "seek out information concerning the environmental consequences of proposed federal actions."⁷ Reading NEPA and FLPMA together, giving full effect to each, necessarily means that the uses of the water

must be considered in making a decision on the right-of-way.

The difficult issue posed in this case is whether the Secretary can make an initial decision on the right-of-way without information about the planned use; whether, in other words, the Secretary must deem the intended use—as opposed to possible uses—of the water to be information necessary to his decision whether to grant the application. The previous opinion of the Deputy Solicitor concluded that such information was essential to his decision, and the failure to obtain it prior to decision would be, in effect, a violation of FLPMA.

We must turn first to the statutory language itself. The language of 43 U.S.C. § 1761(b)(1) seems permissive; *i.e.*, the Secretary shall require such information "which he deems necessary to a determination, in accordance with the provisions of this Act, as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions which should be included in the right-of-way." It is noteworthy that the necessity of providing information "reasonably related to the use, or intended use" of the right-of-way is tied directly to the Secretarial decision on both the right-of-way *and* the terms and conditions which must be included with it. It is also noteworthy that Congress refers to information "reasonably related to the use, or *intended use*," (*italics added*) rather than to possible or speculative uses. This strongly implies that a specific use must be

⁷ 580 F.2d at 473. The Court went on to point out that some element of speculation is implicit in NEPA, and that one of the functions of an EIS is pointing out unknown environmental effects. *Ibid.*, citing *Jicarilla Apache Tribe v. Morton*, 471 F.2d 1275, 1280 (9th Cir. 1973); and *Sipi v. AEO*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

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within the contemplation of the applicant at the time application is made. The use of the "which he deems necessary" language, however, must have been intended to vest some discretion in the Secretary.

Nothing in the legislative history conclusively resolves the specific question here at issue. Although the House Report's discussion of this section admonishes the Secretary to be cautious in seeking information, it also underlines the connection between the seeking of information and the formulation of permit terms and conditions:

(b) Submission and disclosure are required by applicants for a right-of-way of any and all plans, contracts, agreements or other information or material which the Secretaries deem necessary for a determination as to whether the right-of-way shall be granted, issued or renewed and the terms and conditions of the right-of-way, if it is granted. One purpose of this is to enable the Secretaries concerned to make decisions and determine terms and conditions which will foster competition among producers and distributors. A condition consistent with this purpose is a requirement on transmission line companies to use their excess capacity for wheeling power from other systems. For the sake of economical operations and avoidance of undue burdens on the government and on applicants, the Committee expects the Secretaries to be cautious in their demands for information. They are expected to seek only the minimum amount of information essential for making the determinations required by law.⁸

In its evaluation of Title V, the Senate Committee recognized that precise plans of operation may be uncertain at the time of application. In commenting on sec. 501(b) (1)—which requires an applicant for a right-of-way "for a new project which may have a significant impact on the environment" to submit a plan of "construction, operation, and rehabilitation" for such right-of-way, 43 U.S.C. § 1761(b) (1) (1976)—the Senate Report states:

The information required is to be set forth in regulations or stipulations and must include information in certain specified areas. It is not intended that the plans of construction, operation, or rehabilitation be a detailed final plan since all details and conditions cannot be known at the time of application. However, the plan should be a description in as much detail as the state of the planning for the particular project will permit and must be adequate enough for the Secretary or agency head to make an informed judgment on the application and on the need for imposing any special terms and conditions which the public interest may require.⁹

Besides recognizing that final plans may be lacking at the application stage, however, the Senate Report underscores the necessity of making "an informed judgment"—the key criterion for the Secretary to act under Title V.

As noted above, both secs. 1761 (b) and 1765 refer specifically to terms and conditions to be included

⁸H. Rep. No. 1163, 94th Cong., 2d Sess., 20 (1976).

⁹S. Rep. No. 583, 94th Cong., 1st Sess., 72 (1975).

with the right-of-way. Sec. 1761 speaks of information necessary for both the determination whether the right-of-way shall be issued *and* the terms and conditions which should be included. Sec. 1765 requires *all* rights-of-way to contain terms and conditions which will, *inter alia*, protect the environment and specifically "minimize damage to scenic and esthetic values and fish and wildlife habitat." These terms and conditions must be formulated in advance of a decision on environmentally important rights-of-way, to give the applicant the opportunity to formulate a proposed plan of construction, operation and rehabilitation complying with them.¹⁰

The statutory language itself makes readily apparent that Congress has given the Secretary specific and strict instructions concerning terms and conditions (FLPMA § 505, 43 U.S.C. § 1765 (1976)) (*italics added*):

Each right-of-way *shall* contain—

(a) terms and conditions which will (i) carry out the purposes of this Act and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; (iii) require compliance with applicable air and water quality standards * * * for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards; and

(b) such terms and conditions as the Secretary concerned deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way * * *; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.¹¹

These requirements make clear that it may not be possible to include fully complying terms and conditions in a right-of-way where the ultimate use is uncertain. To take one obvious example, it is uncertain how damage to scenic and esthetic values may be "minimized" if the use of the water is now unknown. This reflects Congress' contemplation either that the Secretary cannot issue a right-of-way in the face of uncertain use, or, if he decides to do so, that the right-of-way can be issued only if the Secretary retains the right to approve future or different uses of the water.

The question reduces itself to whether the seemingly permissive language of sec. 1761 concerning information overrides the inference—arising from sec. 1764's mandate to submit a plan of operation, and sec.

¹⁰ As noted above, if the project needing the right-of-way would have a significant effect on the environment, as this one concededly does, then § 504(d) requires submission of a plan of construction and operation of the right-of-way which complies with the proposed terms and conditions to be attached to the right-of-way. See pp. 295, 296, *supra*.

¹¹ See Rep. (now Senator) Melcher's comment on Title V in 122 Cong. Rec. H7620 (daily ed. July 22, 1976) (*italics added*): We think that the whole title [V of FLPMA] expands the * * * responsibility *requiring that he [the Secretary] must make certain stipulations* if he should grant a permit.

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1765's mandate to include protective terms and conditions—that basic information concerning specific planned uses is necessary before the application can be entertained by the Secretary.

Certainly there are powerful reasons for rejecting this application unless the use of the water is known and disclosed. Carter and ARCO in essence seek to speculate with the water which will be stored partially on public lands. No use being yet fixed, the water will probably eventually be sold to the highest bidder or developed for its most profitable use at some point in the future. Indeed, there is nothing which would prevent Carter and ARCO from turning the water back to agricultural use, or using it for a completely different use. The Secretary could easily question whether it is in the public interest to grant the right-of-way now and permit this speculation.

Speculation in public resources has always been disfavored. Congress long ago erected a policy against speculation in the public lands. Any person applying to enter public land under the Homestead Act was required to file an affidavit swearing that he or she did not apply for the land "for the purpose of speculation."¹²

¹² § 2290 of Revised Statutes, as amended by Act of Mar. 3, 1891, 26 Stat. 1099 (repealed by FLPMA). See also *Bailey v. Sanders*, 228 U.S. 603 (1913); *Union Naval Stores v. United States*, 240 U.S. 284 (1916); *United States v. Morehead*, 243 U.S. 607, 612 (1917); *Great Northern Ry. Co. v. Reed*, 270 U.S. 539 (1926).

To take another example, one of the purposes of the excess land limitation in reclamation law is to limit private speculative gains resulting from reclamation projects. See *United States v. Tulare Lake Canal Co.*, 535 F. 2d 1093, 1119 (9th Cir. 1976); *cert. den.* 97 S. Ct. 1156 (1977). FLPMA itself stands in part for the end of an era of speculation in public resources. See, e.g., S. Rep. at 27–36; the Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411–1418, Pub. L. 88–606, 78 Stat. 982 (1964); *One Third of the Nation's Land*, Final Report of the Public Land Law Review Commission (PLLRC), Ch. 18 (1970); *Reed v. Morton*, 480 F. 2d 634 (9th Cir. 1973).¹³

And certainly the experience with the federal coal leasing program in the past two decades has not been a happy one, with nearly eighteen billion tons under lease and very little developed. Congress' dissatisfaction with that situation is well-

¹³ The PLLRC took some pains to guard against undue speculation in public lands and resources. Addressing disposals of public lands, the Commission noted that reasonable restrictions are sometimes appropriate "to prevent speculation or diversion of land uses detrimental to the public interest, while permitting local communities and states an opportunity to exercise continuing control over use changes by the adoption of suitable planning and zoning measures." While we are not here dealing with disposal of public lands, the practical effect of reservoir construction here is to fix the use of these public lands for a long time to come. It should also be noted that FLPMA in part reflected the PLLRC's recommendations. The Senate Report on FLPMA noted that the Act was consistent with more than 100 of the PLLRC's 135 recommendations. See S. Rep. No. 94–583 (94th Cong., 1st Sess.), at 35 (1975).

known. The Federal Coal Leasing Amendments Act of 1976, passed two months prior to FLPMA over Presidential veto, 30 U.S.C. §§ 201 *et seq.* (1976), Pub. L. No. 94-377, stands foursquare for the notion that private speculation in publicly-owned coal resources, without diligent development, is not sound public policy.

One result of allowing the speculation here is to open the possibility that—even though the uses considered possible today have been discussed in the EIS and can be taken into account in making a decision—new, unforeseen uses for the water could surface in the future. These new uses could involve impacts which the Secretary would deem unacceptable and therefore not in the public interest to promote by use of federal lands.

Another possibility is that, by the time the water is to be used, some of the potential uses now regarded as reasonable could become unacceptable as a matter of policy. For example, one currently recognized potential use of the water is for mine-mouth generation. At some point, however, the Federal Government could declare mine-mouth generation in this region unacceptable.¹⁴ It is likewise possible to envisage mining of coal for surface

gasification as becoming unacceptable, if *in situ* gasification becomes feasible. Experience teaches that the future is not easy to predict, even a few years ahead.

It would, then, be entirely reasonable for the Secretary to conclude that information about the specific use of the water is necessary to a decision whether the right-of-way should be granted. But does this strong public policy against speculation, the mandatory requirement in sec. 1765 for inclusion of terms and conditions adequate to protect the public interest, and Congress' reference to "the use, or intended use," override the seemingly permissive statutory language ("which he deems necessary") of sec. 1761? This is a difficult judgment given the lack of specific congressional direction.

General rules of statutory construction, however, provide sufficient guidance. Where there is in the same statute a specific provision and a general one which in its most comprehensive sense would include matters embraced in the specific provision, the specific provision must control. The general provision must be taken to affect only such cases within its general language which are not within the provisions of the particular provision.

¹⁴ Cf. the so-called Metzenbaum amendment to the Clean Air Act of 1977, § 125, Pub. L. No. 95-95, Aug. 7, 1977, 91 Stat. 885, 42 U.S.C. § 7401, *et seq.*, which requires local coal sources to satisfy local coal needs in some circumstances. Specifically, the section authorized a state, the President, or the EPA Administrator to require any major stationary source of pollution not in compliance with an implementation plan or subject to a coal conversion order to enter into long-term contracts for local or regional coal where severe

economic disruption or unemployment would result from use of fuels other than local or regional coal.

Sec. 125 of the Clean Air Act of 1977 was amended by the National Energy Conservation Policy Act of 1978, Pub. L. No. 95-619, 92 Stat. 3206, Nov. 8, 1978. Sec. 661 of Pub. L. No. 95-619 removed the authority of the Governor of a state to require use of local or regional coal, placing total authority for such action in the Federal Government.

United States v. Cihal, 336 F. Supp. 261 (W.D.C. Pa. 1972), *aff'd*. 497 F. 2d 922 (5th Cir. 1974); see also *Ritter v. Dagel*, 156 NW. 2d 318 (S.C. Iowa 1968); *Brady v. Detroit*, 91 NW. 2d 257 (S.C. Mich. 1958); *Western Realty Co. v. Reno*, 172 P. 2d 158 (S.C. Nev. 1946). Furthermore, the Supreme Court has specifically held that the meaning of specific statutory provisions may not be changed by superimposing upon them inferences from general statutory provisions, even if found in the same statute. *National Labor Relations Bd. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). See also *Adamowski v. Bard*, 193 F. 2d 578 (1952).

On balance, I conclude that the general language of sec. 1761 is overridden by sec. 1764's specific mandate to submit a plan of operation, sec. 1765's specific mandate to include protective terms and conditions, and Congress' reference to "the use, or intended use" of the right-of-way. I hold, therefore, that the Secretary may not consider this application without further information being supplied.¹⁵

¹⁵ It is important to remember that the context in which this issue is posed is where the use of a large percentage of the water stored (71%-89%) is not known. The Secretary's legal duty is modified as the percentage declines; for example, there would be less reason for pause if the use of only a small percentage of the water were unknown. This in itself suggests that approaching this problem by regulations—which can anticipate and control a range of possibilities far easier and more predictably than case-by-case decision—is much desired. See text accompanying footnote 6, above.

In reaching this result, I have considered factors, other than those already discussed, which support this result. First, not only is the apparently permissive language of sec. 501(b) directly tied to the decision whether to grant the right-of-way, and if so, what terms and conditions should be included, but the Secretary is required to obtain fair market value for the right-of-way. See 43 U.S.C. §§ 1701(a)(9); 1764(g). This is difficult if not impossible to calculate when the use of the water is unknown.

Second, if this permit application were granted, but the Secretary conditioned the right-of-way on subsequent approval of use and retained a continuing power of approval of the water use once the right-of-way is granted, the permittee might well argue, at some point in the future, that the United States is barred from enforcing that condition and exercising that reservation; *i.e.*, that once the Secretary grants the application, he is barred from controlling or determining new or additional uses. Although I am unpersuaded by that argument, the simpler course is to avoid the possibility altogether by requiring the applicant to disclose now the intended use of the water, and to petition the Secretary for permission to change the use if, in the future, the applicant so desires.

Third, in any event, postponing the decision on how the water can

be used until after the reservoir is completed makes it practically more difficult for a Secretary to reject uses which may offend public policy at the time they are proposed. The expenditure of money to complete the structure may, intended or not, shift the equities somewhat and preclude a totally objective evaluation of the propriety of uses proposed after completion.

Fourth, this interpretation is consistent with national water policy. The Final Report of the National Water Commission¹⁶ stresses that "[c]ertain regions of the Nation either already are or potentially could in the future be using water beyond their natural water resources. Steadily increasing municipal and industrial water requirements in these areas, and potentially others, * * * could place severe strains upon limited water resources." Our denial of this application will address this problem by preventing the tying up of water for speculative purposes and thereby leaving the water free for current uses as they develop. The Administration's water policy message¹⁷ combines emphasis on economic feasibility with conservation and environmental protection. Refusing to license a premature application will enable federal, state and local planners to make sound, informed judgments as to the economic feasibility of a project and will reduce the possibility of the project's being subject to a series of

delays or forced abandonment because of adverse environmental considerations that may develop. The NWCR emphasized the importance of pre-planning for informed decisionmaking and the need for information on application for permits.¹⁸ It suggested that permits should contain, among other things, the full source of water supply, the point of diversion, and the place, nature and time of use. And, at page 528, the NWCR concludes as to reservoirs (as herein), canals, and powerplants

when or whether new facilities can be built will depend on understanding more completely *their effects when in operation* and the consequences of not having them available when needed * * * [T]he ultimate use of basic data is to provide a sound base for decisionmaking * * * (italics added)

Our position is fully consistent with these suggestions.

Fifth, the result I reach is also consistent with a recent case holding that an EIS on a proposed federal oil and gas lease sale need not consider state and local laws which might affect various possible methods of transporting oil from the lease area to the shore. See *County of Suffolk v. Secretary of the Interior*, 562 F. 2d 1368, 1378-82 (2d Cir. 1977), *cert. den.*, 434 U.S. 1064 (1978). The court there held that exploration of offshore mineral resources is particularly susceptible to accomplishment in discrete stages, and with additional knowledge obtained at each successive stage, a

¹⁶ *Water Policies For the Future*, 8, 9 (June 1978) (hereinafter referred to as NWCR).

¹⁷ June 6, 1978.

¹⁸ NWCR at 205-225, 280-94, 365-94.

further EIS could be prepared. The *County of Suffolk* court found that the development of OCS oil and gas resources has been accorded a high priority by Congress where it can be done consistent with protection of the environment. The Nation's years of experience with OCS development suggest that it can be properly controlled and safeguarded, making the Court of Appeals' judgment a reasonable one. Here, by contrast, the use of this water is totally unknown. Some possible uses which have been suggested have never been commercially successful in the United States, and are fraught with environmental and other uncertainties. Moreover, the water here could be used for some totally unknown purpose far beyond present comprehension or contemplation. In such circumstances, the rule of *County of Suffolk* cannot control.

Sixth, the result I reach here is consistent with the Supreme Court decision in *Udall v. FPC*, 387 U.S. 428 (1967). This pre-NEPA decision stands foursquare for the notion that possible impacts must be considered prior to decision, despite statutory language which seemed to give the Commission discretion to make a judgment without specifying the factors to be considered. Specifically, the Supreme Court overturned an agency decision and remanded the case back to the FPC to make an informed decision despite the discretionary language of

section 7(b) of the Federal Water Power Act.

The primary question in the cases involves an interpretation of § 7(b) of the Federal Water Power Act of 1920, as amended by the Federal Power Act, 49 Stat. 842, 16 U.S.C. § 800(b), which provides:

"Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development."¹⁹

A license under the Act empowers the licensee to construct, for its own use and benefit, hydroelectric projects utilizing the flow of navigable waters and thus, in effect, to appropriate water resources from the public domain. The Supreme Court held that: "The determinative test is whether the project will be in the public interest, and that determination can be made only after an exploration of all relevant issues."²⁰ The Court further stated:

The question whether the proponents of a project "will be able to use" the power supplied is relevant to the issue of the public interest. So too is the regional need for the additional power. But the inquiry should not stop there. * * * [Relevant issues also include] future power demand and supply, alternate sources of

¹⁹ 387 U.S. at 431.

²⁰ 387 U.S. at 429.

power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish and commercial and recreational purposes, and the protection of wildlife.

* * * * *

[T]he Commission will not have discharged its functions under the Act unless it makes an informed judgment on these phases of the cases.²¹

This case strongly supports the result that the Secretary of the Interior must have some information from the oil companies as to their use or intended use of the Powder River Reservoir water. Without this information, the Secretary cannot make an informed decision, and he does not have the discretion to grant the right-of-way application.

CONCLUSION:

I must emphasize once again that my decision here must be understood in the context of the facts with which I am presented. The bulk of the water here in question is for an admittedly unknown use. Such water is, moreover, to be stored in an arid region with scarce water supplies and vast potential and developing energy resources, including coal, uranium and oil and gas. The real parties in interest are energy companies frankly conceding their desire to use this water eventually for energy conversion, probably involving exotic conversion techniques not yet demonstrated to be economically feasible and whose impacts are not known. But these companies also cannot now do more than speculate about how the water will in fact be used.

I am not, in other words, presented with a situation where there are but a few uncertainties of the type which normally characterize rights-of-way applications. Nor, in this case, do those uncertainties embrace possible choices among conventional alternatives with known consequences. In such circumstances, caution is dictated.

As a final caution, I must point out that these facts present what is perhaps the clearest possible case of uncertainty. I am not holding that FLPMA requires that all end uses must (or can be) pinpointed in a right-of-way application; for example, I do not believe that, in the ordinary case, an applicant for a right-of-way to build an electric transmission line across public lands must disclose all the end uses for the electricity transmitted over the facilities to be constructed. A rule of reason must apply here, and my holding is simply that, given the specific facts presented by this application, the conceded unknowns prevent the Secretary from making an "informed decision" on the application, and therefore he may not proceed to consider it.

LEO KRULITZ,
Solicitor.

RECLAMATION LAW—CONTROL OF THE SALE PRICE OF FORMERLY EXCESS LANDS*

Bureau of Reclamation: Excess Lands
Sec. 46 of the Omnibus Adjustment
Act of 1926, 43 U.S.C. § 423e (1976), re-

²¹ 387 U.S. at 450-1.

*Not in Chronological Order.

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quires the Secretary of the Interior to control and approve the purchase price of both initial sales of excess land, and resales of this formerly excess land until one-half the construction charges allocated to such land has been paid, in order for the land to continue to be eligible for project water.

In approving the sale price of formerly excess land until one-half the construction charges allocated to such land has been paid, the Secretary of the Interior is required to use the same standard used for approving the sale price of the initial sale of excess land; that is, the sale price must be fixed by the Secretary on the basis of the actual bona fide value of the land on the date of appraisal without reference to the value added by the project. The price approval requirement will not apply to formerly excess lands which were acquired, with Secretarial approval, from excess into non-excess status prior to May 18, 1979, the date of this opinion.

Statutory Construction: Administrative Construction

In determining whether interpretation of a statute should be given prospective effect, some of the factors to be considered are whether the statute is easily susceptible to more than one interpretation; whether the interpretation being overruled has been followed since enactment of the statute; the nature of the reliance placed on the precedent by the parties; the purpose of the statute or rule in light of public policy; the harm to the parties who have relied on the precedent to their detriment; and the harm either to the government or the public purpose.

Regional Counsel Memorandum (Anti-speculation provisions in Sec. 46 of Adjustment Act), Aug. 23, 1949, overruled; Regional Counsel Memorandum

(Excess Lands—Central Valley Project—Sales of Excess Lands), June 8, 1951, overruled.

M-36913

May 18, 1979

OPINION BY

OFFICE OF THE SOLICITOR

MEMORANDUM

To: SECRETARY

FROM: SOLICITOR

SUBJECT: RECLAMATION LAW—
CONTROL OF THE SALE PRICE OF
FORMERLY EXCESS LANDS

I. INTRODUCTION

In response to a court order in *National Land for People v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976), the Department issued proposed rules and regulations respecting sales of excess land. 42 FR 43044 (Aug. 25, 1977). These proposed rules contained a provision authorizing the Secretary to control the sale price of resales of formerly excess land. This provision interpreted applicable law to prohibit the speculation and collection of windfall profits on so-called "turn-around" sales of excess lands.¹

The purpose of this opinion is to set out the legal basis for that interpretation, and provide guidance to the Bureau as to how the sale

¹ I first set forth and explained the reasons for this interpretation in testimony, discussed at p. 314 below, to the House Interior Subcommittee on Water and Power in July 1977. The Department has consistently taken that position since, and has included an express provision to that effect in recent reclamation contracts. See p. 317 below.

price may be controlled. To summarize what follows, I hold that sec. 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e (1976), requires the Secretary to control and approve the purchase price of both initial sales of excess land, and resales of this formerly excess land until one-half of the construction charges allocated to such land has been paid.

Because the Department's past practice has not been consistent, however, there is a question whether this opinion should be given retroactive or prospective effect. As explained below, considering the applicable standards for determining when an opinion should be given prospective effect, this opinion should be applied only to resales of excess land which is transferred, with Secretarial approval, into non-excess status after the date of this opinion, until one-half the construction charges have been paid, regardless of how many times that formerly excess land is resold. The prospective application of this opinion is to prevent inequities that could result from disrupting accounting, lending and other financial and legal practices concerning formerly excess lands. Since this Department had taken, in at least one region of the Bureau of Reclamation, the position that sale prices of formerly excess land need not be controlled, landowners of formerly excess land valued those lands on balance sheets at current market value. Also, lending institutions made loans based on the market value of those formerly excess

lands. This approach should fully protect those landowners and financial institutions who have valued formerly excess lands at a price higher than the controlled sale price. At the same time, this approach will, consistent with the standards for determining whether an opinion should be given retroactive or prospective effect, limit the speculative benefits and windfall profits which would otherwise be obtained.

II. BACKGROUND

1. *The Reclamation Act of 1902, the Reclamation Program and Its Purposes*

The purposes of the reclamation law have been summarized by the federal courts as follows:²

The project was designed to benefit people, not land. It is a reasonable classification to limit the amount of project water available to each individual in order that benefits may be distributed in accordance with the greatest good to the greatest number of individuals. The limitation insures that this enormous expenditure will not go in disproportionate share to a few individuals with large land holdings. Moreover, it prevents the use of the federal reclamation service for speculative purposes.³

It is a basic goal of the reclamation laws to create family-sized farms in areas irri-

² Useful summaries of the background of the Reclamation Act of 1902 can be found in *Solicitor's opinion*, 68 I.D. 372, 374 (1961); Taylor, "The Excess Land Law: Execution of Public Policy," 64 Yale L.J. 477, 481-87 (1955); and Sax, "Federal Reclamation Law," II *Waters and Water Rights* (1967, Clark Ed.) §§ 110, 110.1, pp. 113-21; § 120.1, pp. 210-14.

³ *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 297 (1958). See also *United Family Farmers v. Kleppe*, 552 F. 2d 823, 826 (8th Cir. 1977). The Court in *Ivanhoe* also pointed out that the Federal Government can impose

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gated by federal projects. It is also a basic goal of the reclamation laws to secure the wide distribution of the substantial subsidy involved in reclamation projects and limit private speculative gains resulting from the existence of such projects.⁴

As these quotations reflect, the control of speculation in the benefits of reclamation projects was a central goal of Congress from the very beginning.⁵

To further these purposes, and in particular to avoid the monopolization and land speculation which had plagued prior federal disposal of the public domain, Congress included in sec. 5 of the Reclamation Act the acreage limitation: "No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner." 43 U.S.C. § 431 (1976). Subsequent legislation was enacted to correct defects which surfaced in implementing the original legislation, to better carry out those original policies. See, e.g., 43 U.S.C. § 544 (Act of Aug. 9, 1912); 43 U.S.C. § 471 *et seq.* (Act of Aug. 13, 1914); 43 U.S.C. § 511 (Act of May 15, 1922); 43 Stat. 701-04 (Act

of Dec. 5, 1924); 43 U.S.C. § 423 (Act of May 25, 1926).

2. Sec. 46 of the 1926 Act.

We are here concerned with the last of these major efforts to "fine-tune" the excess land law, sec. 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e (1976). It requires, among other things, that contracts between the United States and irrigation districts provide that:

[A]ll irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised * * * and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value * * * without reference to the proposed construction of the irrigation works, and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half of the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary. [Italics added.]

It would serve no useful purpose here to delve deeply into the background of events leading up to the 1926 Act. That history has been fully and authoritatively discussed elsewhere.⁶ Suffice it to say that sec. 46 was designed to cure specific shortcomings which had surfaced in

reasonable conditions on the use of federal funds and property, relevant to the federal interests in the reclamation program and its overall objectives, 357 U.S. at 295, and that it is entirely proper for the Federal Government to "regulate that which it subsidizes." 357 U.S. at 296, quoting *Wickard v. Filburn*, 317 U.S. 111, 131 (1942).

⁴ *United States v. Tulare Lake Canal Co.*, 535 F. 2d 1093, 1119 (9th Cir. 1976), cert. den. 429 U.S. 1121 (1977); reh. den. 430 U.S. 976 (1977).

⁵ See also H.R. Rep. No. 1468 (57th Cong. 1st Sess.) (1902), pp. 5-8; H.R. Rep. No. 505 (63d Cong., 2d Sess.) (1914).

⁶ See, e.g., *United States v. Tulare Lake Canal Co.*, *supra*. 535 F. 2d at 1131-35.

carrying out the excess land law—to further, not denigrate or modify, the policies of that law. As one of my predecessors has observed:

As the excess land provisions have evolved from 1902 to the present, the purpose of Congress has been consistent. The changes that have been made have been in the means to accomplish the end, never to change its fundamental purpose. As the law has evolved the Congress has sought not to weaken but to strengthen; not to open loopholes but to close them; not to encourage speculation but to stop it.⁷

Sec. 46 must be interpreted from that perspective.

III. THE ISSUE—CONTROL OF THE SALE PRICE OF LAND IN RECLAMATION PROJECTS

The question is the extent to which the underlined provision quoted above requires the Secretary to control the sale price of lands benefiting from reclamation project water until one-half the construction charges against those lands have been repaid.

The literal language of sec. 46 can be interpreted in one of two ways:⁸

(a) The provision refers only to the initial sale of excess land,⁹ and does not apply to *any* non-excess

land, whether formerly excess or not. That is, the phrase “such lands” refers only to excess lands and not to those same lands once they have been sold.

(b) The provision refers to the initial sale of excess land, and any subsequent sales involving that land, but does not refer to the sale of any land which was non-excess at the time the project came into being and remains so thereafter. That is, “such lands” refers to lands required by the earlier part of sec. 46 to be sold as excess, both before and after they are sold into non-excess status.

The issue is not without practical importance. Although values vary according to soils, climate, and other factors, lands which are blessed with a supply of federal reclamation water typically have a value easily two or three times what it would be without such water.¹⁰

Expressing the two interpretations above in hypothetical terms (based on real examples), can the purchaser of excess land, who holds this land as non-excess for an investment of, say, \$500 per acre, turn around and sell it to another for, say, \$1,500 per acre? The first interpretation would require such a result. Under the second interpretation, the Secretary must, until one-half the construction charges are paid, regulate that second, “turn-around” sale of formerly excess

⁷ 68 L.D. 372 at 377 (1961); see also *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 297 (1958); *United States v. Tulare Lake Canal Co.*, *supra*, 535 F.2d at 1131-32, 1134, 1135.

⁸ Professor Joseph Sax, a noted authority on reclamation law, argues for a third interpretation; namely, that the provision refers to the sale of *all* land in the project, whether excess, formerly excess, or continuously non-excess. See Sax, “Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy,” 64 Mich. L. Rev. 13 (1965).

⁹ Under § 46, excess land must be sold “on the basis of its actual *bona fide* value * * * without reference to the proposed construction of the irrigation works. (Italics added.)

¹⁰ Professor Sax cites one example in Oregon where land values increased by as much as five times where federal water became available in 1961. In the first decade after the reclamation program began, the average price of land benefiting from the program increased exceeded 750%. Sax, *op. cit.* note 8, *supra*, at 14, 17.

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lands to ensure that benefits attributable to the project are not obtained.¹¹

This question has received careful attention from two sources: (a) a search analysis of this precise problem by Professor Sax, *op. cit.*, note 8, *supra*, and (b) the opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. Tulare Lake Canal Co.*, 535 F. 2d 1093, 1135 (9th Cir. 1976), *cert. denied* 429 U.S. 1121 (1977), *reh. den.* 430 U.S. 976 (1977).

Professor Sax's article explains the source of the problem (pp. 15-16), the early history of reclamation legislation (pp. 16-18), the history of Congress' attempts to curb speculation and windfall profits in the sale of excess land (pp. 18-22), and the legislative history of sec. 46 of the Omnibus Adjustment Act with which we are centrally concerned (pp. 22-27). He also discusses Congressional action after 1926 (pp. 29-30), issues of policy (pp. 31-40) and practical administration (pp. 40-44), and whether state laws and existing contracts present any barriers to the interpretation he supports (pp. 44-45). He points out that the Department initially began to implement the 1926 law by controlling

the sale price of all project lands (pp. 26-27), and concludes that the Department's previous failure to control the sale price of project lands has allowed "the wrong people [to enrich] themselves at the expense of their fellow citizens." Sax, 64 Mich. L. Rev. at 46.¹²

Eleven years after Professor Sax's article, the first federal court to ever reach this issue addressed the problem. *United States v. Tulare Lake Canal Co.*, *supra*. The Court unanimously concluded that the pertinent part of sec. 46 was included to meet the problem of speculation and windfall profits in the sale of formerly excess lands, "by enabling the Secretary to control the price at which some resales were made." 535 F. 2d at 1135. In a footnote to that remark (*ibid.*, note 172), the Court pointed out:

By imposing restrictions on subsequent sales of excess land only until one half

¹² As noted above, Professor Sax argues in this article for the broadest possible result—the anti-speculation price control provision should apply to all lands in the project, and not just formerly excess land. His basic arguments are: The sale price control provision was originally in sec. 46 before language was added dealing specifically with excess land, and it was only "fortuity" that the provision for sale of excess lands was inserted ahead of it. While he concedes that grammatically this insertion supports the idea that Congress thus intended to limit the coverage of the sale price control provision to formerly excess land, he finds nothing in the legislative history or Congress' general objective to suggest this is the case. (*Id.*, at 24-25.) He also suggests that it makes little sense to restrict the control merely to formerly excess land. This would allow a person who owned 160 acres in the area before the project was built to sell that land at any time after the project was built and reap the additional value provided by the federal project at any time without interference. Yet a person who bought 160 acres from an excess landowner could not do the same thing. (*Id.*, at 32-38.)

¹¹ The second interpretation would not, however, require the Secretary to regulate the sale of non-excess land which had not previously been excess. Under Professor Sax's (third) interpretation, see note 8, *supra*, the Secretary would be required to regulate the sale price of all lands benefiting from reclamation project water to prevent speculative profits, if those lands are to continue to receive reclamation project benefits.

of the construction charges have been repaid, Congress reached an accommodation between competing policies of eliminating the middleman and allowing the purchasing settler to alienate his land freely and realize some of its enhanced value, which might be attributable in part to the settler's efforts in reclaiming the land and preparing it for cultivation.¹³

It might be argued that this conclusion is *dictum*. The central issue in this part of the case was whether Congress had allowed those landowners who had paid off the construction charges allocated to their lands to escape the excess land law—the so-called “payout” argument. The proponents of payout argued that, because price control ends under sec. 46 when one-half of the construction charges had been paid, sec. 46 therefore acknowledged and ratified the concept of payout itself. The Court of Appeals held that this was a “patent misconstruction” of the “meaning and purpose of” the relevant clause in sec. 46; viz., that its “purpose and effect was to strengthen the Secretary's hand in dealing with speculative sales, not to weaken it.” 535 F. 2d at 1134. The Court pointed out: “When the clause in question is confined to sales subsequent to the initial sale of excess land, as intended, it does not embody a partial ‘payout’ principle as appellees argue.” *Ibid.* Whether one considers this *dictum* or a holding, it is plain that the Court of Appeals carefully considered the matter and left no

doubt at all about its view that sec. 46 applied to the sale of formerly excess land.

IV. PAST DEPARTMENTAL PRACTICE

The Department's past practice in implementing sec. 46 has not been uniform. Professor Sax discusses provisions inserted in several dozen Bureau of Reclamation contracts which provided for control over the sale price of all lands in a reclamation project which did not have pre-existing water rights. See Sax, *supra*, 64 Mich. L. Rev. at 27-28, notes 51-52. See also H. Rep. No. 448, 81st Cong., 1st Sess. 18 (1949).

A 1946 Bureau of Reclamation study of the acreage limitation, citing these same contract provisions, concluded that the Secretary had authority to control speculation in the sale of non-excess lands.¹⁴ This report pointed out that previous to 1926, Congressional efforts to control speculation had

failed because no provision was made for control of such price at sales subsequent to the first disposal of excess land. Section 46 meets this problem by providing that until one-half of the construction charges against such excess land are paid, sale of the land does not carry the right to receive water until the purchase price is approved by the Secretary.¹⁵

The Report also pointed out:

Control of speculation on non-excess lands has also been attempted on a number of projects since 1926.¹⁶

¹⁴ *Report on Land Ownership Survey on Federal Reclamation Projects With Legal, Historical and Economic Background*, U.S. Department of the Interior (July 1946), Part II, pp. 30-34.

¹⁵ *Id.*, p. 46.

¹⁶ *Id.*, p. 48.

¹³ *Tulare Lake*, *supra*, note 172. Although the Court cited Professor Sax's analysis, it did not suggest that this anti-speculation control applied to other lands benefiting from a project besides formerly excess land.

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And further:

Control of speculation upon non-excess lands has been imposed by statute on several projects covered by the provisions of the Department of the Interior Appropriation Act of 1926 (43 Stat. 1166-1170), on the Tucumcari Project by amendment of the authorization, April 9, 1938 (52 Stat. 211), and in the Columbia Basin Project Act of 1943 (57 Stat. 14). Authority of the Secretary of the Interior to control speculation upon non-excess lands on other projects stems from his power to make rules and regulations necessary to assure repayment. (Sec. 10, Reclamation Act of June 17, 1902, 32 Stat. 390). In two cases decided by the Circuit Court of Malheur County, Oregon, such provisions were sustained on this basis. (Unreported. *Terry v. Pinney and Owyhee Irr. Dist.*, and *Pfeiler v. Greig and Owyhee Irr. Dist.*, Jan. 27, 1937).¹⁷

We have found two mentions in Departmental records of the interpretation that sec. 46 provides for no control of the sale price of formerly excess non-excess lands. The first is in a short teletyped message dated Aug. 23, 1949, to the Washington Office of the Bureau of Reclamation from the Bureau's Regional Counsel in California, which states as follows:

It is our opinion that bona fide purchaser of excess land who holds such land as

owner of non-excess land has right of resale free of sale price limitations contained in section 46 of the Omnibus Adjustment Act of May 24, 1926.

The message went on to concede that "the legislative intent of sec. 46 is not so clear that plausible argument could not be advanced for other conclusions."

A similar opinion was expressed two years later by the California Regional Counsel of the Bureau, in a memorandum to the Bureau's District Manager in Fresno. It also contained no legal analysis.

Neither message referred to the previous practice of controlling such sales or attempted to distinguish prior practice or explain why the interpretation it was based on was wrong.

Because neither document contains any persuasive legal reasoning or support for its interpretation, and the evidence for the other interpretation is so overwhelming, I overrule these expressions. As Professor Sax notes: "The Department has in the past taken a broad view of its authority to deal with [turnaround sales]; it is time to exercise that broad authority again." 65 Mich. L. Rev. at 45.

V. OTHER RECENT DEVELOPMENTS

Two other recent developments warrant some attention. First, in 1977 the House Committee on Interior and Insular Affairs considered a bill (H.R. 3420) which would have expressly provided for control of the sale price of turnaround

¹⁷ *Id.*, p. 48. It should be noted that the Bureau did not subscribe to the view adopted by Professor Sax that sec. 46 requires the control of the sale price of all lands. Rather, the Report found such authority in the Secretary's broad power to "perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect." See 32 Stat. 390, 43 U.S.C. § 373 (1976); see also 38 Stat. 690; Op. Atty. Gen. (Apr. 27, 1905); Sol. Op. M-33902 (May 31, 1945); Assoc. Sol. Op. M-34999 (Oct. 22, 1947).

sales of formerly excess lands, but not other non-excess lands. Testifying on behalf of the Department, I expressed support for the purpose of H.R. 3420, but pointed out that in our opinion the legislation was unnecessary because existing law provided for such control.¹⁸

The House Committee reported a bill, but it died without further action being taken on it.¹⁹ The House Report observes that sec. 46 appears designed to prevent speculation at least in the sale of formerly excess land:

Indeed, since section 46 was drafted to remedy the land speculation which took place under the Reclamation Extension Act of 1914, and since that consisted primarily of middlemen reaping unearned profits on resales of formerly excess land, this interpretation appears to be correct.²⁰

The House Report also noted the ample opportunity for land speculation, and the evidence that such speculation had been taking place:

This opportunity [for land speculation and the collection of windfall profits] has not been overlooked by land speculators. The record abounds with examples of speculators who have descended upon areas served by Bureau of Reclamation

irrigation projects and reaped tremendous profits on these so-called turnaround sales of formerly excess land. One of the most graphic examples of the profits to be made from this speculation surfaced in a recent criminal fraud case brought by the United States against a land developer for his handling of excess lands located in the Westlands Water District, San Luis Unit, California. Evidence in that case indicated that 1,758 acres of excess land were purchased for \$900,000 and were sold eleven days later at a profit of \$229,365.²¹

The House Report concluded:

As long as land developers are able to purchase excess land at a price set by the Secretary of the Interior and resell this land at the prevailing market price, land speculation will continue. Of course, this will hinder the development of the family sized farm as a desirable form of rural life.²²

The second recent development was in the report of the so-called San Luis Task Force.²³ This Task Force was created pursuant to Public Law 95-46 (June 15, 1977), to investigate and report on the management, organization and opera-

¹⁸ I stated: "[W]e believe Congress has already given us all the authority we need to develop a sound workable program that, among other things, minimizes the opportunity for speculation."

¹⁹ In my view, there is no significance to the fact that this bill was not enacted. Shortly after the hearings, the Department proposed regulations providing for the control of the sale price of formerly excess land. Because I testified, and the House Report concluded, that the correct interpretation of sec. 46 requires such control, the bill was unnecessary.

²⁰ H. Rep. No. 95-909 (1978), p. 5. Although the Report cites Professor Sax for this result, it does not discuss his broader interpretation.

²¹ *Id.*, p. 6. My testimony also identified specific examples of turnaround sales, involving the Westlands Water District in California, where a buyer paid from \$450-\$700 per acre for land purchased from excess status, and sold it within a fairly short period of time without any price control. The price for non-excess land in the Westlands District during this period ranged from \$900-\$1,700 per acre, obviously allowing realization of a substantial profit.

²² *Ibid.* The Report also states, erroneously, that the Department had consistently interpreted sec. 46 since its enactment not to allow the control of sale price of even formerly excess land. *Id.*, p. 5. Both Professor Sax and the 1946 Bureau Study document several examples where the Department had exercised control of the sale price of all lands in a project, including formerly excess land. See Part IV, *supra*.

²³ *Special Task Force Report on San Luis Unit, Central Valley Project, Calif.* (1978).

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tions of the San Luis Unit to determine the extent to which they conform to the purposes and intent of reclamation law. Part of the Task Force's responsibility was to report on

the record of enforcement of the requirements concerning the disposition of excess lands by persons receiving Federal water or major project benefits, * * * and an evaluation of the success of the project in fostering family farms, including the adequacy of present legislation and departmental rules and regulations pertaining to these provisions.

The Task Force concluded that sec. 46 of the 1926 Act should be read to provide for control of the sale price of formerly excess lands, since it found that this interpretation "best meets the statutory goal of preventing speculation."²⁴

In sum, the fact that sec. 46 of the 1926 Act should be interpreted to require controlling the sale price of formerly excess land is not in substantial doubt. The only justification found in Departmental records for the idea that sec. 46 does not require control of the sale price of formerly excess lands was stated in conclusionary terms, without legal analysis, and with an acknowledgement that there were substantial arguments for the contrary interpretation.²⁵ No reported

decisions have reached such a conclusion; in fact, in the only case reaching this issue, the Circuit Court of Appeals rejected it.²⁶

There is no doubt that Congress viewed sec. 46 as a remedial measure, to improve administration of the reclamation program, and in particular to better achieve the overriding goal of the reclamation program of providing family farm opportunities for settlers, without opportunity for speculative profits. Considering these circumstances, I believe that the law should be interpreted in conformity with its statutory purpose, that the Department's apparent failure for the last 30 years²⁷ to further that purpose was wrong, and that the Secretary is obliged to control the sale price of formerly excess lands.²⁸

496 (1964). The Ninth Circuit noted that the "Wilbur letter" was an "informal" opinion reached under circumstances indicating a "lack of careful consideration" and thus "not entitled to deference" as an administrative interpretation of law. 559 F. 2d at 539.

²⁶ *Tulare Lake, supra*.

²⁷ Both of the documents reflecting a narrow interpretation of sec. 46 emanated from the Bureau's Regional Counsel in Sacramento. I have been unable to determine whether a similar practice was followed in other regions, or whether any of the provisions in earlier contracts providing for control of the sale price of both formerly excess and non-excess land were enforced after the Regional Counsel took a different position.

²⁸ I cannot, however, subscribe to Professor Sax's view that control of the sale price of all lands is required by sec. 46. Although Professor Sax makes a generally persuasive case that there is no sound distinction between formerly excess land and other land receiving project water, when it comes to converting the value added by the taxpayer-subsidized project into cash, the language of sec. 46 will not readily sustain his interpretation. It is difficult, in other words, to argue that the general reference to the control of sale price in the same section as the regulation of ex-

²⁴ *Id.*, p. 202. It did not directly address the broader interpretation urged by Professor Sax.

²⁵ In this respect, the situation is similar to the so-called "Wilbur letter" purporting to exempt the Imperial Irrigation District from the excess land law. See *United States v. Imperial Irrigation Dist.*, 559 F. 2d 509 (9th Cir. 1977); rehearing *en banc denied* (Apr. 26, 1979); see also Solicitor's Opinion 71 I.D.

Congress clearly intended that the excess land purchaser be interested in farming the land, not in windfall profits. Failing to control the sale price in the turnaround sale means that in one fell swoop a person can realize the federal subsidy—the incremental amount of value added to the land by the federal project—whether that person is the kind of settler envisioned by Congress or not. It also has the negative effect of reaping this benefit at the expense of the next purchaser of that land, thus impairing the financial position of those who later buy the land and enter into the project.²⁹

It is worth noting that excess landowners themselves have recognized the problem created by the failure of this Department to control the sale price of turnaround sales. For example, a representative of the Southern Pacific Land Co., which owns over one hundred thousand acres of excess lands in the Westlands Water District, told a

congressional committee three years ago:

It is obvious that the price gap [between the value of the lands with project water and the value without project water] gives rise to a potential for serious abuse. *The prospect of quick gains has brought in many opportunists who are pressuring to buy the land. This complicates our problem of finding bona fide farmer-buyers.* We intend to do our best in selecting purchasers who do in fact intend to farm the land after it passes out of our hands.

Southern Pacific welcomes suggestions from either the Bureau of Reclamation or another federal agency on how we should screen applications to purchase property not acquired by existing lessees, to determine that the buyers intend to farm the lands themselves.³⁰ (Italics added.)

This difficulty faced by a conscientious excess landowner trying to comply with the letter and spirit of reclamation law in disposing of its excess lands dramatically illustrates the problem created by the failure to control turnaround sales. Control of the sale price of formerly excess lands will effectively eliminate speculation, and the difficulty.

This result does not prohibit an owner from selling his land at an uncontrolled price. On the contrary, such sales can be made without any scrutiny by the Secretary. The only penalty is the one stated in sec. 46: "[N]o sale of any such lands *shall carry the right to receive* [project] *water* unless and until the purchase

cess lands sales is a "bizarre grammatical fortuity," as Professor Sax suggests. (64 Mich. L. Rev. at 25.) It is far easier to argue that it was deliberate. The Ninth Circuit expressed its support for Professor Sax's view only in the context of formerly excess lands. The Bureau's 1946 study reflects that the Department's past efforts to control the sale price of *all* lands was regarded as voluntary and somewhat experimental, pursuant to the Secretary's general authority to implement the excess land law. The Report also pointed out instances in which Congress had expressly provided for this broader control on particular projects, thus suggesting, by negative inference, that Congress had not *required* such a result for all projects. *But see* Sax, *op. cit.*, 64 Mich. L. Rev. at 29-30.

²⁹ *See* Sax, *op. cit.*, 64 Mich. L. Rev. at 19; *see also* Fact Finder's Report, S. Doc. No. 92, 68th Cong., 1st Sess. (1924), pp. 37, 113.

³⁰ Statement of Ned Smith, Chief Agronomist, Southern Pacific Land Co., to the Joint Hearings Before the Select Committee on Small Business and the Committee on Interior and Insular Affairs, United States Senate (94th Cong., 2d Sess., 1976) pp. 634, 638.

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price involved * * * is approved by the Secretary." (Italics added.) Sale at an uncontrolled price eliminates only the right to receive project water. Although this is, to be sure, a valuable right, there is no legal restraint on what someone may do with his or her property apart from it.

Having reached this conclusion, there remains the question whether the Secretary must set the sale price of formerly excess land without *any* consideration of the value added by the federally-subsidized project. Sec. 46 says that the sale of such land shall not carry with it the right to receive federally-subsidized water unless the purchase price is "approved by the Secretary," but it does not at that point set forth standards upon which the Secretary is to act. Earlier in that same section, however, the Secretary is directed to fix the sale price on the basis of its value without any reference to the federal project.

Clearly Congress' intent was that the Secretary control the sale price of excess and formerly excess land to prevent speculative benefits until one-half the construction charges have been paid. It is logical and consistent to use the same standard in setting the sale price of formerly excess lands, until one-half the construction charges have been paid.³¹

³¹ The regulations proposed by the Department in August 1977 provided for a two-tiered control. For the first ten years after the excess land was sold, any resale must be for a price not reflecting project benefits. If it is sold after ten years, and until one-half

VI. EFFECT OF THIS OPINION

The only remaining question is how this opinion should be applied to those who now hold formerly excess land. First, I note that, pursuant to my instruction, the Bureau has resumed its earlier practice, in force for at least some contracts in the period 1926-1949, of inserting in all new contracts with irrigation districts a clause which expressly provide for the control of the sale price of formerly excess lands.³² Other contracts with irrigation districts and existing recordable contracts are simply silent on this point or provide for control of the sale price of all lands.³³ With respect to those receiving water under these new contracts, there should be no doubt about the Secretary's power to control the sale price of formerly excess land. And the silence of other

of the construction charges allocated to it have been paid in regularly scheduled installments, the Secretary would "monitor any resale to prevent unreasonable profit from accruing to the seller." See § 426.9(b) 42 FR 43048 (Aug. 25, 1977). Although this might be read to allow some value attributed to the federal project to be included in the sale price after ten years, I believe this result is not consistent with sec. 46. The same standard—excluding all value attributed to the project—should apply both to excess and formerly excess lands, until one-half the construction charges have been paid.

³² For example, Article 15 of the 1979 San Luis Unit agricultural water service contract with the Westlands Water District provides as follows (italics added):

"Until one-half the construction charges against the lands in the Contractor's service area shall have been paid, no sale of any excess or formerly excess lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior."

³³ See Part IV, *supra*.

existing contracts on this point means I am not called upon to decide how the proper interpretation of sec. 46 should be applied in the face of a contract expressly providing otherwise.

Although the Department has not had a consistent and well-articulated position against controlling the sale price of formerly excess land, I assume nevertheless that in recent years agents of the Department have, at least in some regions, failed to control the sale price.

There are several examples where the Department has concluded that prior practice or interpretation was simply erroneous. In some of these, the revised interpretation was made applicable to claims or applications then pending before the Department; e.g., where the interest of the United States in preventing improper disposition of the public lands was deemed to outweigh the speculative interest of oil shale claimants. *United States v. Winegar*, 81 I.D. 370 (1974), reversed *sub. nom. Shell Oil Co. v. Kleppe*, 426 F. Supp. 894 (D. Colo. 1977); *aff'd.* (10th Cir., Jan. 25, 1979) (reversal of long-standing interpretation of application of Mining Law of 1872 to oil shale claimants).³⁴

³⁴ Courts have many times held that acquiescence by the government's agents does not estop the government or alter the Secretary's obligation to enforce the law. See *Atlantic Richfield Co. v. Hickel*, 432 F. 2d 587, 591-92 (10th Cir. 1970); *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180 (1957); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947); *Utah Power and Light Co. v. United States*, 243 U.S. 339, 410 (1917).

In others, the ruling was made prospective only. For example, in *Issuance of Noncompetitive Oil and Gas Leases on Lands Within the Geologic Structure of Producing Oil and Gas Fields*, 74 I.D. 285 (1967), the Solicitor concluded that, contrary to prior practice, noncompetitive oil and gas lease offers must be rejected if they were included in a known geologic structure any time before the lease was issued. 74 I.D. at 285-86. Failure to apply this principle in the past undoubtedly cost the United States revenue—at a minimum, leases were obtained without competitive bidding or the payment of bonuses. Applying the doctrine to existing leases would have, on the other hand, possibly resulted in the cancellation of scores of leases, some of which could have been almost fifty years old. Consequently, the decision was made prospective only. 74 I.D. at 290. This position was approved in *McDade v. Morton*, 353 F. Supp. 1006 (D.D.C. 1973), *aff'd.* 494 F. 2d 1156 (D.C. Cir. 1974). See also *Franco Western Oil Co. (Supp.)*, 65 I.D. 427 (1958), approved in *Safarik v. Udall*, 304 F. 2d 944 (D.C. Cir. 1962), *cert. den.*, 371 U.S. 901 (1962).

United States v. Winegar, *supra*, reviews several reported court decisions which address the issue of whether new administrative interpretations of a statute should be given prospective effect. See 81 I.D. at 394-98. Some of the factors to be considered are whether the statute is easily susceptible to more than one interpretation; whether the interpretation being overruled has

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been followed since enactment of the statute; the nature of the reliance placed on the precedent by the parties; the purpose of the statute or rule in light of public policy; the harm to the parties who have relied on the precedent to their detriment; and the harm either to the government or the public purpose.³⁵

Applying these rules in the context of this opinion, the following is clear:

(a) Although sec. 46 is literally susceptible of the interpretation that only the sale price of excess lands must be controlled, its purpose and scope make plain Congress' intent to guard against speculation and to foster achievement of the basic objective of the excess land law.

(b) The contrary interpretation I overrule here was not the one adopted upon enactment of sec. 46. On the contrary, it first appeared in one region of the Bureau 23 years after enactment, and was never expressly extended to other regions. The interpretation I adopt here was the Department's original interpretation.

(c) The nature of "reliance" on this interpretation by reclamation landowners would most commonly take one of two forms: either a purchaser of formerly excess lands has paid fair market value for the land,

so that the seller has converted the value added by the Federal Government to cash; or the land has not been resold but the owner has obtained a mortgage on the formerly excess land or other loans or advances in an amount reflecting some or all of the incremental value supplied by the federal project. Beyond this, "reliance" would be mainly if not wholly in the form of an expectation that the land could be sold at an uncontrolled price; *i.e.*, that the seller can, if he or she chooses to sell, convert the value added by the federal project to cash.

(d) The purpose of sec. 46 was to implement the acreage limitation, and to prevent the value added by the federally-subsidized project from going to speculators rather than settlers intent on establishing family farms on the land. It is an important purpose, going directly to the core of the reclamation program.

Considering these factors and the cases discussed above, I believe the following approach best balances the competing considerations of being fair to those who may have relied on non-enforcement and carrying out Congress' intent.

First, with respect to formerly excess land which has already been sold at an uncontrolled price reflecting the incremental value added to the land by federal project water, it would serve no useful purpose now to control the price at which such land may be sold in the future. Such control would merely penalize those who have purchased the land for a

³⁵ See, e.g., 81 I.D. at 394-95; *Linkletter v. Walker*, 381 U.S. 618 (1965); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940); *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 355 (1932).

price reflecting the added value provided by the federal project. The windfall profit has already been realized.³⁶ Although the Bureau could undertake the task of sorting out already consummated sales and proceeding to attempt to recover the windfall profits, the administrative burdens of untangling the past sales and recovering that profit would be significant. Therefore, the control of the sale price should only be exercised at most where formerly excess land has not yet been sold at a price reflecting the value added by the federal project.

There remains the question of how this opinion should be applied to those who have purchased formerly excess land at a controlled price, but have not yet resold it.

It might appear on the surface that these persons would not be penalized by now controlling the price at which land can be sold, since they acquired it at a price which did not reflect project benefits. On closer examination, however, those who have acquired land out of excess status and not yet sold it may have relied to a great extent on the assumption that the sale price of formerly excess lands would no longer be controlled. In making this assumption, these landowners would value their land in financial statements and for tax purposes at current market value, not at the controlled sale price. Furthermore, fi-

nancial institutions, in at least partial reliance upon past Departmental practice, have taken mortgages on formerly excess lands based on their ability to be sold at current market value. While some lending institutions are legally restricted from holding long-term mortgages on the land for more than 75% of the market value, the local banks and other lenders often make cash advances for crop production taking into account not only the revenues from crop production, but also the landowner's margin of equity over and above the long-term mortgage on the land. Also, in determining whether monthly mortgage payments can be made on time, long-term lenders consider whether a landowner will be able to obtain these cash advances on crop production. Finally, even if the mortgage on the land is not based on full market value or if there is no mortgage at all, almost every landowner must rely to a certain extent on these short-term crop loans and similar cash advances to meet cash-flow needs while the crop is growing. The crop loans are made taking into account the financial statements of the landowners, their equity in the land, and their net worth.

To now require these lands to be sold at a controlled price could in effect seriously undermine the cash position of these landowners, and upset the financial arrangements they and lending institutions have made.

For all these reasons, I have decided this opinion will not apply to

³⁶ In the words of Professor Sax, the value added by the federally-subsidized reclamation project has been "converted into cash and possibly * * * carried off the project to be used for purposes which are of no interest or advantage to the reclamation program." 65 Mich. L. Rev. at 34.

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lands which were acquired, with Secretarial approval, from excess into non-excess status prior to the date of this opinion.³⁷ However, all who acquire land out of excess status after the date of this opinion, and their financial backers, will be on notice that the sale price of formerly excess land will be controlled until one-half of the construction charges allocated to such lands have been paid, and therefore they have no right to rely on being able to sell formerly excess land at an uncontrolled price, and can adjust financial arrangements and lending practices accordingly.

This result avoids doing violence to the financial position of land-owners and lending institutions, while still limiting speculation and carrying out Congress' intent to the extent consistent with notions of fairness.³⁸

LEO KRULITZ,
Solicitor.

DELIGHT COAL CORP.

1 IBSMA 186

Decided June 5, 1979

Petition for review by the Office of Surface Mining Reclamation and Enforce-

ment (OSM) of the Jan. 29, 1979, decision of Administrative Law Judge Tom M. Allen in a civil penalty proceeding (Docket No. CH 9-4-P). The decision vacated a notice of violation and two orders of cessation issued by OSM under the provisions of the Surface Mining Control and Reclamation Act of 1977.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Findings

Except in cases governed by 43 CFR 4.1187(e) or 4.1266(b) (7) (ii), a written decision or a written order confirming a ruling from the bench constitutes the initial decision. The written decision or order incorporating the ruling from the bench must comply with 43 CFR 4.1127. The only exception to this rule is when the Administrative Law Judge both specifically states that a ruling from the bench constitutes his initial decision and fully complies with the requirements of 43 CFR 4.1127 in that oral ruling.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

An Administrative Law Judge may raise questions which go to the authority of the Department under the Act even if the parties fail to raise those questions.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

If a party objects to any ruling or action taken by an Administrative Law Judge it should do so in a manner that the Administrative Law Judge can reconsider his action in light of that objection.

³⁷ If excess land has been transferred into non-excess status prior to this opinion without Secretarial approval, it is ineligible to receive project water under 43 U.S.C. § 423e (1976). Because Secretarial approval is necessary for water eligibility, it is the date of the Secretarial approval which will control in those circumstances.

³⁸ This approach is also consistent with Professor Sax's recommendation, 65 Mich. L. Rev. at 45, note 105, although he was arguing for broader control.

4. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

It is imperative both to the just implementation of this Act and to the proper functioning of administrative review within the Department that parties cooperate with the Administrative Law Judge's conduct of the proceeding and with his requests.

5. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

The definition of "permittee" adopted by the Secretary for the initial regulatory program in 30 CFR 700.5 includes those persons who, through ignorance or dishonesty, fail to obtain a permit before engaging in activities regulated by a state.

6. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally

During the initial regulatory program a person may be assessed a civil penalty under 30 CFR 723.1 for violations of a permit condition, a regulation, or a provision of Title V of the Act even though he does not hold a permit from the state regulatory authority.

APPEARANCES: Marye L. Wright Esq., Office of the Field Solicitor (Charleston), Shelley D. Hayes, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement

(OSM) sought review of an administrative law judge's (ALJ's) Jan. 29, 1979, decision vacating Notice of Violation No. 78-I-17-3 and Cessation Orders Nos. 78-I-18-2 and 78-I-18-3 issued to Delight Coal Corp. (Delight) on Aug. 18, 1978, under the provisions of sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).¹

We disagree with the ALJ's holdings that a person cannot be treated as a "permittee" during the initial regulatory program if he does not hold a permit from a state regulatory agency and that if a person does not hold a permit he is not liable for civil penalties. We therefore reverse his decision and remand the case to the Hearings Division.

Factual and Procedural Background

On Aug. 17, 1978, OSM inspected Delight's underground mining operation in Wise County, VA. On Aug. 18, 1978, OSM issued Delight a notice of violation and three orders of cessation. Notice of Violation No. 78-I-17-3 listed alleged violations of five sections of the Act and regulations:² (1) 30 CFR 717.12(b) regarding signs; (2) 30 CFR 717.20(a) relating to topsoil handling; (3) 30 CFR 717.14 dealing with retention of nonwaste materials; (4) 30 CFR 717.17(a) requiring sedimentation ponds; and

¹ 91 Stat. 445, 505; 30 U.S.C.A. § 1271(a)(3) (West Supp. 1979). All further citations to U.S.C.A. are from the 1979 West Supplement.

² The regulations in 30 CFR, setting forth the initial regulatory program, can also be found in 42 FR 62639 *et seq.* (Dec. 13, 1977).

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(5) 30 CFR 717.17(j)(2)(iii) and (iv) specifying haul road construction requirements. Cessation Order No. 78-I-18-1 alleged a violation of sec. 502(d) of the Act, 30 U.S.C.A. § 1252, in Delight's failure to obtain a surface mine permit. Cessation Order No. 78-I-18-2 charged that Delight was mining too close to an occupied dwelling in violation of sec. 522(e)(5) of the Act, 30 U.S.C.A. § 1272. And Cessation Order No. 78-I-18-3 alleged water quality violations under sec. 502(a) of the Act, 30 U.S.C.A. § 1252. On Sept. 13, 1978, Cessation Order No. 78-I-18-3 was amended to state a violation of 30 CFR 710.11(a)(2)(iii), prohibiting any operations that result in significant, imminent environmental harm.

On Sept. 7, 1978, OSM sent Delight a notice that an informal hearing on the cessation orders would be held pursuant to 30 CFR 722.15. This hearing was held on Sept. 13, 1978, and the three cessation orders were orally affirmed. This decision was confirmed by a written decision dated Sept. 25, 1978.

By letters dated Sept. 18, 1978, OSM informed Delight of the proposed civil penalty assessments based on the notice and the orders. Delight filed one-sentence petitions for review of the proposed assessments with the Office of Hearings and Appeals and paid \$12,600 into escrow on Oct. 23, 1978.³

³ See 43 CFR 4.1107(f). The regulations in 43 CFR, governing procedures for hearings and appeals, can also be found in 43 FR 34376 *et seq.* (Aug. 3, 1978).

The Board notes that 43 CFR 4.1151(a) requires that "[a] petition for review of a

On Sept. 25, 1978, OSM terminated violations 1 and 3 of the notice of violation on the grounds that Delight had taken the remedial action ordered. Similarly, on Nov. 14, 1978, Order of Cessation No. 78-I-18-2 was terminated after Delight obtained a waiver from the owner of the dwelling that was located within 300 feet of its mining operation.

On Nov. 24, 1978, OSM filed a motion to dismiss the petition for review on the grounds that Delight had failed to state a claim on which administrative relief could be granted and to comply with the requirements of 43 CFR 4.1152.⁴

A hearing was held in Abingdon, Va., on Jan. 5, 1979. At that hearing OSM withdrew its motion to dismiss. The parties entered several stipulations: (1) violations 1 and 3 of the notice were valid; (2) violations 2 and 5 of the notice were valid, but Delight contested the pro-

proposed assessment of a civil penalty must be filed within 30 days of receipt of the proposed assessment." The record contains only the assessment letters which are dated Sept. 18. It is, therefore, impossible to determine whether Delight's petition was filed within 30 days of receipt of the proposed assessment. The Board has already noted the importance of compliance with this procedural regulation. *C&K Coal Co.*, 1 IBSMA 118, 86 I.D. 221 (1979). This lack of evidence as to the date of receipt highlights the need to provide some evidence in the record of the date of receipt of documents, such as by using return receipt requested mail.

⁴ 43 CFR 4.1152 specifies what information must be included in a petition for review and provides that the petition must be accompanied by full payment of the proposed assessment.

If OSM intended this motion to be in place of the answer required by 43 CFR 4.1153, it may have missed that sec's. 30-day-from-receipt filing requirement. However, the record does not indicate when OSM received its copy of Delight's petition.

posed assessment; (3) Delight contested both the fact of violation and the proposed assessment for violation 4 of the notice; (4) Order of Cessation No. 78-I-18-1 was validly issued, but Delight contested the amount of the proposed assessment; (5) Order of Cessation No. 78-I-18-2 was not contested and OSM agreed to reduce the penalty assessed to zero; and (6) Delight contested both the fact of violation and the proposed assessment for Order of Cessation No. 78-I-18-3 (Tr. 7-8). The ALJ confirmed these stipulations (Tr. 9).

The hearing, therefore, was directed toward the contested facts and proposed assessments of violation 4 of the notice of violation and the third cessation order and the amounts of the proposed assessments for violations 2 and 5 of the notice and for the first cessation order.

At the close of the hearing, the ALJ indicated from the bench that he would reduce the proposed assessments for violations 2 and 5 of the notice and the first cessation order and would combine violation 4 of the notice and the third cessation order because he felt that these two enforcement actions were duplicative. Such a decision would result in a civil penalty liability of \$6,100.

On Jan. 8, 1979, the ALJ issued a memorandum order indicating that, "[p]ursuant to a conference call between the parties,"⁵ he was

vacating the oral order from the bench "in order to prevent a possible miscarriage of justice by a misinterpretation of the law and regulations." In that order the ALJ requested briefs from both parties by Jan. 25, 1979, on three issues:

1. Is a person who does not have a permit to mine coal subject to: (a) P.L. 95-87 (30 U.S.C. § 1201 *et seq.* (1977)); (b) The penalty provisions of 30 CFR 700 *et seq.*
2. If a cessation order is issued to one who is mining without a permit, and that person ceases all mining operations, what is that person's status as far as further civil penalty proceedings are concerned.
3. Can more than one cessation order issue to the same person on the same day for multiple violations of the interim regulations.

The ALJ's order clearly indicated that his "complete and final order * * * [might] differ from the order issued from the bench."

Both parties failed to submit briefs by Jan. 25, 1979. The ALJ issued a written opinion on Jan. 29, 1979, in which he held that, because Delight was not a "permittee" within the meaning of the Act, the civil penalty provisions of sec. 518 of the Act did not apply and that, since one order of cessation was sufficient to close a mine, the issuance of three orders was excessive. Based on these holdings, the ALJ vacated all enforcement actions except Cessation Order No. 78-I-18-1 and ordered that all of the proposed assessment being held in escrow be returned to Delight.

On Feb. 28, 1979, OSM filed a "Notice of Appeal." Under 43 CFR 4.1158 review of decisions of an

⁵ There is no record of this conference call in the file. This failure to record the contents of conversations concerning a case is discussed *infra* at pp. 326, 327.

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ALJ concerning civil penalty assessments are by petition to the Board in accordance with 43 CFR 4.1270 which provides that granting petitions for review of civil penalty decisions lies within the discretion of the Board. Because of the heading of OSM's submission, the Board treated it as a "notice of appeal" rather than as a "petition for review." The acknowledgment letter sent to the parties indicated that 43 CFR 4.1273 would govern the presentation of briefs. Because of the error by both OSM and the Board on this point, the Board will treat the acknowledgment letter as a grant of a petition for review for purposes of this case.⁶

OSM filed its brief on Mar. 30, 1979. Delight did not file a brief.⁷

Discussion

[1] At the conclusion of its brief OSM argues that the ALJ's ruling from the bench was "final agency action" for the Department and could not be changed unless appealed by one of the parties. As support for this argument it cites

⁶ The Board notes that all of OSM's previous and subsequent submissions in the case were clearly titled "Civil Penalty Proceeding," as were all the ALJ's statements and documents concerning the case. Because OSM filed a "notice of appeal" rather than a "petition to review" it did not attach a copy of the ALJ's decision appealed from as it would have been required to do under the provisions governing petitions to review (43 CFR 4.1270(c)).

⁷ Regardless of the circumstances of a particular case, parties are reminded that there is a very real danger that failure to participate before the Board, as well as the ALJ may result in a determination adverse to their position. See *Dean Trucking Co., Inc.*, 1 IBSMA 105, 111-12 and n. 4, 86 I.D. 201, 203-04 (1979).

that part of 5 U.S.C. § 557 (1976) which reads "[w]hen the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule." OSM also cites 43 CFR 4.1127 which provides that "[a]n initial * * * decision disposing of a case shall incorporate—(a) Findings of fact and conclusions of law and the basis and reasons therefore [*sic*] on all the material issues of fact, law, and discretion presented on the record; and (b) An order granting or denying relief."

It is clear that what the ALJ said at the conclusion of the hearing in this case did not constitute what is required by sec. 4.1127. The regulations specifically provide for oral initial decisions in two instances in which a rapid decision is essential: (1) expedited review under 43 CFR 4.1187(e) and (2) temporary relief cases under 43 CFR 4.1266(b) (7) (ii). In all other cases an ALJ presumably "rules" from the bench in order to give the parties a prompt indication of his thinking. The Board will not construe a ruling from the bench as an initial decision unless it fully complies with sec. 4.1127 and unless the ALJ explicitly states at the time that he intends it to be his initial decision. To hold otherwise would mean that the period for the filing of notices of appeal or petitions for review would begin to run from the date of the hearing, even though the parties

did not have any written record of the ALJ's decision. Further, although prompt decisions are desirable, deliberation should not be sacrificed to expedition. If an oral statement from the bench were deemed an initial decision it would deprive an ALJ of the opportunity to consider the record and to write a decision which carefully sets forth findings of fact and conclusions of law and the basis and reasons therefor on all the material issues of fact, law, and discretion presented as required by sec. 4.1127.

Therefore, except in cases governed by 43 CFR 4.1187(e) or 4.1266(b) (7) (ii), a written decision or a written order confirming what was said from the bench constitutes the initial decision. The written decision or order incorporating what was said from the bench must be in accordance with 43 CFR 4.1127. The only exception to this general rule is when the ALJ both specifically states that a ruling from the bench constitutes his initial decision and fully complies with the requirements of 43 CFR 4.1127 in that oral ruling.⁸

[2] OSM also argues that 43 CFR 4.1121 limits an ALJ to deciding those issues actually present-

ed by the parties and does not authorize him to raise other questions *sua sponte*.⁹ The difficulty with this argument is that the first issue raised by the ALJ in his memorandum order of Jan. 8, 1979, and the issue which was central to his initial decision of Jan. 29, 1979, could be considered jurisdictional in nature. In the ALJ's view, if Delight were not a permittee under the Act and the regulations, then OSM would have no authority to regulate it or to take enforcement actions against it during the initial regulatory program. An ALJ may raise questions which go to the authority of the Department under the applicable law even if the parties do not do so. *See Eastern Associated Coal Corp.*, 4 IBMA 1, 15, 82 I.D. 22, 29 (1975).

[3] Two additional problems arise from the Jan. 8 memorandum order, both of which are complicated by the failure of either the ALJ or the parties to place a record of the preceding conference call in the file. First, it is impossible to know whether or not either party objected to the ALJ's intention to vacate his ruling from the bench at that time. Nor is there any other indication that any objection to this procedure was raised before the

⁸ Presumably, the ALJ retains jurisdiction to supplement, qualify, or otherwise modify that decision until the occurrence of one of the three events listed in 43 CFR 4.1121(c):

"(c) Except as otherwise provided in these regulations, the jurisdiction of an administrative law judge shall terminate upon—

"(1) The filing of a notice of appeal from an initial decision or other order dispositive of the proceeding;

"(2) The issuance of an order of the Board granting a petition for review; or

"(3) The expiration of the time period within which a petition for review or an appeal to the Board may be filed."

⁹ This is a recurring theme in OSM's presentations to the Office of Hearings and Appeals. In the sense that neither the Hearings Division nor this Board can summon a case from below on its own initiative, *sua sponte* activity is prohibited. As to determinations of jurisdiction or to being confined to the parties' theories of the case, *sua sponte* is of doubtful relevance. In regard to matters falling between those extremes, it will be appropriate to flesh out the theory and application as specific cases involving specific facts come before us.

ALJ. If a party objects to any ruling of or action taken by an ALJ it should do so in a manner that permits the ALJ to reconsider in light of that objection. When a party fails to raise its objections before the ALJ, but instead chooses to present them for the first time on appeal to the Board, it runs the double risk of receiving an adverse decision from the ALJ and a possible affirmance by the Board.

[4] The lack of a record of the conference call also means that the Board cannot tell whether either OSM or Delight informed the ALJ that it would not submit a brief. In any event, it is imperative both to the just implementation of this Act and to the proper functioning of administrative review within the Department that parties, and especially the Department, cooperate with the ALJ's conduct of the proceeding and with his requests.¹⁰ The Board has already noted the problems arising from the lack of representation on appeal. *See Dean Trucking Co., Inc.*, 1 IBSMA 105, 111-12 and n. 4, 86 I.D. 201, 203-04 (1979). In this case, both sides declined to participate in the development of answers to questions the ALJ indicated were important to his resolution of the case and, indeed, failed to make any response on the record. The ALJ was thus placed in an untenable situation: in effect he was forced to represent both sides and to decide impartially between his own arguments on what he considered to be the central ques-

tion—whether OSM had authority over Delight.

The Board disagrees with the ALJ's answer to that central question. Sec. 502(c) of the Act, 30 U.S.C.A. § 1252, establishes the initial regulatory program: "On and after nine months from the date of enactment of this Act, all surface coal mining operations on lands on which such operations are regulated by a State shall comply with [certain of the reclamation requirements of sec. 515]." Sec. 515 is written for the permanent state or federal program and assumes that either the state or the federal government is properly implementing a permit program. Acting on Congress' stated intention that certain operational and reclamation standards apply during the initial regulatory program, the Secretary defined "permittee" in 30 CFR 700.5 in such a way as to insure that all persons conducting surface coal mining and reclamation operations would be covered during the initial program, despite possible differences in the operation of existing state regulatory schemes:

[A]ny individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization holding a permit to conduct surface coal mining and reclamation operations issued by a State regulatory authority pursuant to a State program or by the Secretary pursuant to a Federal program or a Federal lands program. *During the initial regulatory program the term includes persons conducting surface coal mining and reclamation operations regulated by a State under State law or conducting such operations*

¹⁰ 43 CFR 4.1121(a)(6) grants the ALJ the power to "regulate the course of the proceeding."

under a mining plan approved pursuant to Part 211 of this title. [Italics added.]

[5] Although the Act and its implementing regulations contemplate that persons conducting surface coal mining and reclamation operations will obey the law and obtain the required permit, the definition of "permittee" adopted by the Secretary for the initial regulatory program includes those persons who, through ignorance or dishonesty, fail to get a permit from the proper regulatory authority before engaging in activities regulated by a state.

Delight did not dispute either that it was conducting a "surface coal mining" operation or that Virginia law required it to obtain a surface mining permit. Indeed, Delight obtained a permit while these enforcement actions were pending (Tr. 37). We find, therefore, that Delight is a "permittee" under the initial regulatory program.

[6] During the initial regulatory program the same definition of "permittee" applies to the regulations implementing sec. 518(a) of the Act, 30 U.S.C.A. § 1268(a), which states that "any permittee who violates any permit condition or who violates any other provision of this title, may be assessed a civil penalty." The Secretary has followed the Act's language in covering those persons who fail to obtain a permit under 30 CFR 723.1, the section of the initial regulatory program provisions relating to the assessment of civil penalties: "This Part covers the assessment of civil penalties under section 518 of the Act for violations of a permit con-

dition, *any provisions of Title V of the Act, or any implementing regulations.*" (Italics added.) According to this language a person may be assessed a civil penalty for violations of a permit condition, a regulation, or a provision of Title V of the Act. There is no requirement that, during the initial regulatory program, a person responsible for abiding by those provisions must actually hold a permit in order to be subject to civil penalties for violating them.

Delight admitted violations of the regulations and of Title V of the Act. During the initial regulatory program it may be assessed civil penalties based on those violations regardless of the fact that it did not hold a surface mining permit from the state regulatory authority.

We therefore hold both that Delight is a "permittee" during the initial regulatory program and that it is liable for civil penalties based on violations of the Act or regulations. ALJ Allen's decision of Jan. 29, 1979, is therefore reversed, and this case is remanded to the Hearings Division for further action consistent with this decision.¹¹

WILL A. IRWIN,
Chief Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

¹¹ We intimate no opinion on the correctness of the ALJ's vacating of two of the cessation orders since neither party briefed that issue either for the ALJ or the Board. While we do not suggest that this failure to brief an issue precludes the Board from deciding it, or any other issue, we refrain from exercising our power to do so in this case.

June 12, 1979

APPEAL OF CITY WINDOW CLEANERS

IBCA-1218-10-78

Decided June 12, 1979

Contract No. 68-03-6025, Environmental Protection Agency.

Dismissed.

1. Contracts: Formation and Validity: Legality—Contracts: Formation and Validity: Authority to Make

Where an award is made to a firm while one of the partners is under debarment for violation of a labor statute due to administrative oversight, the contracting officer is without authority to make a valid award, and the purported contract is void ab initio.

2. Contracts: Disputes and Remedies: Jurisdiction

The award of a contract to a statutorily debarred bidder was properly canceled upon discovery of the debarred status and there being no valid contract between the parties, the Board is without jurisdiction to consider an appeal.

APPEARANCES: Mr. Laurence E. Thorp, Attorney at Law, Lively & Wiswall, Springfield, Oregon, for appellant; Mr. Richard V. Anderson, Government Counsel, Cincinnati, Ohio, for the Government.

*OPINION BY ADMINISTRATIVE
JUDGE LYNCH*

*INTERIOR BOARD OF CON-
TRACT APPEALS*

On Motion to Dismiss

This is an appeal from a termination for default issued on July 19,

1978, after appellant has refused to continue contract performance on July 18, 1978. Appellant seeks conversion of the termination action to one for the convenience of the Government and seeks to recover a total of \$9,486.98. The Government filed an answer and motion to dismiss on the grounds that the Board lacks jurisdiction because the award of the contract became void upon discovery by the Government of appellant's debarred status. The parties have submitted the appeal for decision on the record.

Background

On Apr. 26, 1978, appellant was awarded a contract for providing custodial services for Government facilities in Corvallis, Oregon. The award was based on appellants low bid of \$3,235.54 a month submitted in response to an advertised invitation for bids (IFB). Appellant's bid dated Mar. 21, 1978, was signed by Eve M. Roman as owner of the offering firm, "City Window Cleaners." On Page 2 of the Solicitation Offer and Award Form 33, appellant represents that the type of business organization is a partnership (AF-3).¹

Upon issuance on Feb. 13, 1978, the IFB contained the following notation in schedule item 13(h): "Applicable Minimum Hourly Rates of Wages, applicable to contracts in excess of \$2,000 will be furnished contractor as soon as it is available." Amendment No. 1 to the IFB was issued on Mar. 9, 1978,

¹ All references to the Appeal File use the abbreviation AF.

extending the bid opening to Mar. 28, 1978, deleted schedule item 13(h) and substituted in lieu thereof: "(h) U.S. Department of Labor Wage Decision No. 74-249 Rev 5 dated Jan. 20, 1978." The referenced wage determination specified a minimum hourly wage of \$5.44 for "Janitor, porter cleaner," and certain fringe benefits. A copy of Amendment No. 1 executed by Eve M. Roman on Mar. 21, 1978, is included in AF-3.

During May 1978, appellant commenced performance of the contract and requested the contracting officer to increase the monthly contract rate from the bid amount of the minimum wage to the higher wage rates required by the above referenced Department of Labor wage decision (AF-5). The request was denied by the contracting officer by letter dated June 19, 1978 (AF-5). Despite the denial of the price increase, appellant continued to submit invoices at the higher rates requested. Appellant's invoice for May in the amount of \$4,983.72 was paid on July 21, 1978, at the contract price of \$3,235.54. The invoice for June in the amount of \$4,983.72 was paid on Aug. 24, 1978, at the contract price of \$3,235.54 (Government Answer).

The contracting officer's record of telephone conversations with appellant indicate a series of calls from and to Ernest Roman in mid-July 1978 (AF-5). Ernest Roman, husband of Eve Roman, initiated a call on July 13 to attempt to secure the requested increase in contract price. On July 14 Ernest Roman

called to indicate he would not furnish any documentation to support the claimed increase, but would pull off the job on the basis of the Government breach of the contract if the contract price was not increased. Later on July 14, the contracting officer called Ernest Roman to ask whether he was currently disbarred by GAO decision B-3368 dated Apr. 3, 1978. Receiving no direct response, the contracting officer sent a telegraphic message to appellant on July 14, 1978, requesting by July 21, 1978, a copy of the legal partnership agreement upon which appellant's firm is based and a letter setting forth the exact legal relationship of Ernest Roman with appellant (AF-5). The requested information was never furnished. On July 17, a Mr. T. Stevens of City Window Cleaners called as General Manager, and the contracting officer advised that a letter of inquiry respecting Ernest Roman's debarred status was being sent to the Department of Labor. On July 18, Mr. T. Stevens of City Window Cleaners advised the Government project officer that City Window Cleaners would pull off the contract. No employees of appellant appeared for work that evening. On July 19, 1978, the contracting officer talked with Mr. Stevens who repudiated the contract on the grounds that the Government had breached the contract.

By telegraphic message on July 18, 1978, the contracting officer set forth the substance of the above exchanges. He also directed that

performance of the contract be continued and advised that otherwise it would be terminated for default. On July 19, 1978, a telegraphic message from the contracting officer to City Window Cleaners terminated appellant's right to proceed with performance of the contract under the termination for default clause for the failure to provide services on July 18, 1978, and the oral repudiation of the contract by T. Stevens on July 18 and July 19, 1978 (AF-1).

By letter dated July 17, 1978, the contracting officer requested the Department of Labor to investigate Ernest Roman's interest in City Window Cleaners and to advise whether this involvement bars City Window Cleaners from holding this contract. The Department of Labor responded in a letter dated Oct. 2, 1978 (AF-6). The response advised of two Oregon firms operating as City Window Cleaners and one as Contract Maintenance, Inc., all located at the same physical address. The latter firm, Contract Maintenance, Inc., with Ernest Roman as the registered agent with Oregon's Corporation Division, is listed on the GAO decision B-3368 of Apr. 3, 1978, showing debarment for breaching the agreements and representations required by the Service Contract Act of 1965, 41 U.S.C. § 351 *et seq.* (1976) (AF-5 and supplemental submission dated Feb. 8, 1979, by Government counsel). By letter of Nov. 2, 1978, the contracting officer canceled the contract as void ab initio on a finding that

Ernest Roman, a debarred bidder, did have a substantial interest in City Window Cleaners.

Findings of Fact and Decision

In order to ascertain whether the Board has jurisdiction to proceed, the Board must undertake to determine the validity of the contract under which an appeal is brought. (*P.E.C. Corp.*, ASBCA No. 14241, Dec. 31, 1969, 69-2 BCA 8056 and cases cited at page 37,434.)

The affidavits of the contracting officer and project officer are directly in conflict with those of Eve and Ernest Roman regarding the extent to which Ernest Roman exercised managerial control over City Window Cleaners during the bid and performance period. However, both Eve and Ernest Roman admit to Ernest Roman's principal role in the conduct of the business of City Window Cleaners in the years prior to the instant contract. Both claim that this role had ended in the months immediately preceding this contract and that Ernest Roman's involvement in this contract was solely that of unpaid adviser to his wife.

The evidence of record is also contradictory and inconsistent regarding the ownership and control of City Window Cleaners. Appellant's bid includes both a signature of Eve Roman as owner and the representation that the firm was a partnership. Counsel for appellant identifies City Window Cleaners as a partnership in the notice of appeal of Aug. 17, 1978, but does not identify the

partners. The affidavit of Margaret Novak to the effect that Ernest Roman hired her to supervise the contract work is supported by the project manager, Mr. Robert Tripel. He states that upon calling City Window Cleaners on Apr. 26, 1978, to get the job started, he was given Ernest Roman's home phone number. A call to Ernest Roman at that number provided the information that Margaret Novak would run the job and her phone number. The action of hiring the key individual to hire employees and to supervise performance is a direct and tangible involvement in the contract performance. We also note that the debarred firm of Contract Maintenance Inc., and City Window Cleaners share P.O. Box 2769 in Eugene, Oregon.

Some weight must be given to the fact that appellant's threats to pull off the job and the actual abandonment of performance came immediately after the contracting officer requested specific information on the partnership that was City Window Cleaners and Ernest Roman's involvement. Appellant did not respond to this request and the record is devoid of this information. If, in fact, Ernest Roman is no longer a partner in City Window Cleaners, appellant could easily prove that by disclosing the partners in the firm. The failure to do so raises a strong inference that the ownership had not changed at the time this contract was awarded.

[1] Appellant contends that the alleged debarment of Ernest Roman

should not extend to his wife. In an unpublished opinion, B-160179, Dec. 12, 1966, (11 CCF 80,837) the Comptroller General upheld the Government's action to refuse a contract award to a wife claiming to be sole owner of the company, where her son and husband were on the debarred list and were connected with the firm. There, as here, she refused to make a frank disclosure of the interest of the debarred family members and it was found that the possibility of the existence of a community of interest in the firm was reasonably inferred. Similarly, that record did not affirmatively establish the debarred family members' interest, but the Government's action in considering the integrity of the bidder's family was deemed proper.

In the circumstances of the instant case, the failure to disclose the ownership of the firm on request, the history of common ownership of Ernest and Eve Roman, and the direct involvement of Ernest Roman in acting under the contract have led us to conclude that Ernest Roman did have a substantial interest in City Window Cleaners.

[2] At the time the contract was awarded, Ernest Roman was on the debarred bidders list pursuant to GAO decision B-3368, dated Apr. 3, 1978. In the circumstances present here the award to City Window Cleaners contravened the statutory prohibition against awarding contracts to debarred bidders (see unpublished decision B-150870, June 17, 1963, of the Comptroller Gen-

EDWARD SCOTT, SR. & ROBERT CHARLES SCOTT

June 21, 1979

eral).² Accordingly, the contracting officer lacked authority to award the contract to appellant and the purported contract was void. Having made the award through administrative error, being unaware of Ernest Roman's debarred status, the contracting officer properly canceled the contract as void after ascertaining the facts.

There being no valid contract between the parties, the Board is without jurisdiction to consider the appeal. The Government's motion is therefore granted and the appeal is dismissed.

RUSSELL C. LYNCH,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

ALASKA NATIVE DISENROLLMENT APPEALS OF: JAMES EDWARD SCOTT, SR. & ROBERT CHARLES SCOTT

7 IBIA 157

Decided June 21, 1979

Appeals from a decision of an Administrative Law Judge declaring appellants were improperly enrolled under the Alaska Native Claims Settlement Act.

² "It is significant to note too that the issuance of this purchase order to your firm while it was under debarment, effective Apr. 24, 1962, under the Walsh-Healy Act was in contravention of the statutory prohibition in section 3 of the act, 41 U.S.C. 37, against awarding contracts to debarred firms. This would have been sufficient reason in itself to cancel the purchase order if the purchasing activity had sought to rely upon it."

Affirmed in part and reversed in part.

1. Alaska Native Claims Settlement Act: Enrollment: Metlakatla Natives

The appearance of one's name on the Metlakatla Indian community rolls of the Annette Islands Reserve in 1976 in itself is not conclusive of membership status. However, that fact considered in conjunction with other evidence indicating active involvement and contact with the community over the years including the year 1970 does not constitute continuous absence from the community.

2. Alaska Native Claims Settlement Act: Enrollment: Metlakatla Natives

Absent active involvement and contact and continuous absence of 2 years prior to Apr. 1, 1970, by a minor born outside the Metlakatla community and having never resided therein constitutes forfeiture of membership in the community, derived solely through a parent member of that community.

APPEARANCES: Peter A. Danelo, Esq., Preston Thorgrimson, Ellis, Holman & Fletcher, Seattle, Washington, for James Edward Scott, Sr., and Robert Charles Scott, appellants; Bruce Schultheis, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the United States of America, appellee.

*OPINION BY CHIEF
ADMINISTRATIVE JUDGE
WILSON*

*INTERIOR BOARD OF
INDIAN APPEALS*

Pursuant to complaints filed by the United States of America through the Bureau of Indian Affairs

fairs, hereinafter referred to as appellee, on Mar. 1, 1978, under the provisions of 43 CFR Part 4, subpart K, which alleged that James Edward Scott, Sr., and Robert Charles Scott, hereinafter referred to as appellants, were improperly enrolled under the Alaska Native Claims Settlement Act, a consolidated hearing on the complaints was held on May 4, 1977, in Seattle, Washington, by Chief Administrative Law Judge L. K. Luoma.

Thereafter, Judge Luoma in his decision of Dec. 4, 1978, concluded that the appellee had met its burden of proof that appellants were members of the Metlakatla community as of Apr. 1, 1970, and that they were therefore improperly enrolled under secs. 3, 5, and 19 of the Alaska Native Claims Settlement Act of Dec. 18, 1971, 85 Stat. 688 (43 U.S.C. § 1601 (1976)), and ordered appellants' names stricken from the roll of Alaska Natives.

A timely appeal was filed by appellants on Jan. 3, 1979, with the Director, Office of Hearings and Appeals. The Director, under the authority of 43 CFR 4.1010 and 4.704 designated the Board of Indian Appeals to decide these cases along with all other Alaskan Native disenrollment appeals on an ad hoc basis.

Appellants in support of their respective appeals allege as follows:

(1) The complaints should have been dismissed under 25 CFR 43(h).15(e) because there was no mention in the complaints of membership in the Metlakatla com-

munity as of Apr. 1, 1970, and no timely amendment was made of the complaints.

(2) James E. Scott, Sr., forfeited his membership in the Metlakatla community through his continuous absence from the community prior to Apr. 1, 1970.

(3) Robert C. Scott's rights under the Act were unfairly made to depend solely on the membership of his father in the Metlakatla community; moreover, Robert C. Scott had forfeited his membership in the community through his continued absence from the community prior to Apr. 1, 1970.

The dispute as we see it focuses around the interpretation of Article 2, sec. 6 and Article 2, sec. 4, Part 5 of the constitution and bylaws of the Metlakatla Indian Community.¹ & ² More particularly does it involve the interpretation of the word "continuous" as it appears in the constitution and bylaws.

We find no merit in appellants' first contention regarding dismissal of the complaints. Under the amended regulations (25 CFR 43 (h).15(e), July 20, 1978) the appel-

¹ Article II, sec. 6, provides in relevant part: "Continuous absence from Annette Islands Reserve for two years or longer, unless the member so absent shall notify the Council in writing, within such two-year period, of his intention to return, shall constitute forfeiture of membership in the community."

² Article II, sec. 4, part 5 provides: "Minor children of persons so admitted shall be members of the community, but upon attaining their majority they shall, in order to continue their membership, proceed as set forth in Paragraph 3 above." (Para. 3 referred to above reads as follows: "In the presence of the Mayor and Council, the declaration in section 2 of this Article shall be read to the applicant, and he or she shall sign a copy of the declaration before two witnesses.")

June 21, 1979

lee had the burden of proving enrollment in the community on Apr. 1, 1970. The appellee at the hearing alleged and produced evidence that appellants were enrolled in the community as of Apr. 1, 1970, and that the complaint was therefore considered amended and in conformity with the new regulations.

Concerning appellant James Scott's contention as set forth in item 2 above, we find for the reasons hereinafter set forth that he was a member of the community as of Apr. 1, 1970.

[1] The fact that James Scott's name appeared on the community's rolls in 1976 in itself is not conclusive of his membership status. However, that fact considered in conjunction with other evidence indicating his active involvement and contact with the community over the years since his enrollment in 1965, including the year 1970, did not in our opinion constitute continuous absence from the community, notwithstanding his residence in the State of Washington during those years. Accordingly, being a member of the community as of Apr. 1, 1970, he was ineligible for enrollment under the Act as found by Judge Luoma whose finding to that effect is affirmed.

[2] Contention 3 regarding Robert Scott presents an altogether different situation from that of his father, James Scott. Robert Scott's purported membership in the community derives solely from his

being the minor child of a member, pursuant to the community's constitution and bylaws.³

It is the contention of appellant, Robert Scott, an adult since Nov. 11, 1976, that his rights under the Act were unfairly made to depend solely on his father's membership in the community; moreover, that he had forfeited his membership in the community through his continuous absence from the community from prior to Apr. 1, 1970. Robert Scott was born in the State of Washington on Nov. 11, 1959, and has resided there ever since. Unlike his father, Robert Scott has not been actively involved or in contact with the community. For the foregoing reasons we are in agreement with his contention that his membership in the community was forfeited by his continuous absence prior to Apr. 1, 1970. Accordingly, we find that Robert Scott was properly enrolled under the Act and Judge Luoma's finding to the contrary must be reversed.

NOW THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals and pursuant to 43 CFR 4.704, it is hereby ordered that the order of Dec. 4, 1978, insofar as it pertains to James Edward Scott, Sr., is affirmed, and as to that part that pertains to Robert Charles Scott is reversed, and Robert Charles Scott's name is ordered reinstated on the roll of Alaska Natives.

³ See footnote 2, *supra*.

This decision is final for the Department.

ALEXANDER H. WILSON,
Chief Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

WESTERN ENGINEERING, INC.

1 IBSMA 202

Decided *June 22, 1979*

Appeal by Western Engineering, Inc., from the Feb. 9, 1979, decision of Administrative Law Judge Joseph E. McGuire in a temporary relief proceeding (Docket No. NX9-22-R). The decision denied applicant's request for temporary relief from a notice of violation issued by the Office of Surface Mining Reclamation and Enforcement.

Reversed and Remanded.

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

When an interim regulatory provision is ambiguous when applied to a particular operation, and its intended meaning is not clarified by reference to the interim regulatory provisions as a whole and other pertinent interpretive materials, that provision may be construed in favor of the entity seeking relief from its application.

APPEARANCES: James G. Tyler, Esq., Hagedorn and Tyler, Tell City, Indiana, and William T. Bennett, Esq., Wyatt and Salzstein, Washington, D.C., for Western Engineering, Inc.; John Philip Williams, Esq., Office of the Field Solicitor (Knoxville),

Michael J. Kurman, Esq., Office of the Solicitor, and Marcus P. McGraw, Assistant Solicitor for Enforcement, Office of the Solicitor, all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

An appeal has been filed with the Board by Western Engineering, Inc. (Western), from an Administrative Law Judge's (ALJ's) denial of its application for temporary relief from Notice of Violation No. 79-II-21-1, issued to Western by the Office of Surface Mining Reclamation and Enforcement (OSM) on Jan. 25, 1979, pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).¹ In this notice, OSM indicated that Western had failed (1) to cause surface drainage from three portions of its operation to be passed through a sedimentation pond and (2) to maintain the level of suspended solids and pH in discharges from two portions of the operation within required limits. Both of these conditions were specified as violations of 30 CFR 715.17 (interim requirements for the protection of the hydrologic system).² On Jan. 26, 1979, OSM modified the notice to specify additional violations of 30 CFR 715.17.

¹ 91 Stat. 445, 505; 30 U.S.C.A. § 1271(a)(3) (West Supp. 1979). All further citations to U.S.C.A. are from the 1979 West Supplement.

² The regulations in 30 CFR, setting forth the initial regulatory program, may also be found in 42 FR 62639-62716 (Dec. 13, 1979).

This decision is final for the Department.

ALEXANDER H. WILSON,
Chief Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

WESTERN ENGINEERING, INC.

1 IBSMA 202

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1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

When an interim regulatory provision is ambiguous when applied to a particular operation, and its intended meaning is not clarified by reference to the interim regulatory provisions as a whole and other pertinent interpretive materials, that provision may be construed in favor of the entity seeking relief from its application.

APPEARANCES: James G. Tyler, Esq., Hagedorn and Tyler, Tell City, Indiana, and William T. Bennett, Esq., Wyatt and Salzstein, Washington, D.C., for Western Engineering, Inc.; John Philip Williams, Esq., Office of the Field Solicitor (Knoxville),

Michael J. Kurman, Esq., Office of the Solicitor, and Marcus P. McGraw, Assistant Solicitor for Enforcement, Office of the Solicitor, all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

An appeal has been filed with the Board by Western Engineering, Inc. (Western), from an Administrative Law Judge's (ALJ's) denial of its application for temporary relief from Notice of Violation No. 79-II-21-1, issued to Western by the Office of Surface Mining Reclamation and Enforcement (OSM) on Jan. 25, 1979, pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).¹ In this notice, OSM indicated that Western had failed (1) to cause surface drainage from three portions of its operation to be passed through a sedimentation pond and (2) to maintain the level of suspended solids and pH in discharges from two portions of the operation within required limits. Both of these conditions were specified as violations of 30 CFR 715.17 (interim requirements for the protection of the hydrologic system).² On Jan. 26, 1979, OSM modified the notice to specify additional violations of 30 CFR 715.17.

¹ 91 Stat. 445, 505; 30 U.S.C.A. § 1271(a)(3) (West Supp. 1979). All further citations to U.S.C.A. are from the 1979 West Supplement.

² The regulations in 30 CFR, setting forth the initial regulatory program, may also be found in 42 FR 62639-62716 (Dec. 13, 1979).

June 22, 1979

Western does not dispute the factual basis for the violations of 30 CFR 715.17 found by OSM at its operation; rather, in this appeal Western seeks a reversal of the ALJ on three alternative grounds: (1) that Western's operations do not constitute "surface coal mining operations" within the meaning of the Act and interim regulations, and, thus, are not subject to OSM's authority; (2) that the Act does not authorize the issuance of a notice of violation to an entity that does not have a state mining permit; and (3) that the notice issued to Western is void because OSM did not provide the regulatory authority for Kentucky with an opportunity to take appropriate action prior to its issuance. We find that since the definition of "surface coal mining operations" in the Act and regulations is ambiguous as it applies to Western's operations, and since it is not clear from the provisions of the initial regulatory program, taken as a whole, that operations such as Western's were intended by the Secretary to be subject to those provisions, the decision of the ALJ must be reversed.

Factual and Procedural Background

Western Engineering, Inc., is a family-owned, Indiana corporation licensed to do business in the Commonwealth of Kentucky. The company operates a river terminal on the Green River in Ohio County, Kentucky.

Since 1974, Western has made use of its river terminal exclusively for

the preparation and loading of coal for river barge shipments, primarily to utilities (Tr. at 16; 42). The equipment employed by Western in this activity includes a truck scale, a double row crusher, a rotary coal breaker, two dump truck feed hoppers, various conveyor belts and vehicles, a barge used as a loading platform, and a tugboat (Tr. at 15). In the course of handling coal, Western sprays it with water or takes other measures to control the emission of dust, and sometimes crushes it to render its handling easier for Western and the consumer (Tr. at 17; 20-21; 41-45).

Western receives coal exclusively from strip mines, the nearest of which is 10 to 12 miles and the farthest of which is approximately 50 miles from its terminal (Tr. at 16). Western does not own or lease any coal mines, nor does it purchase any of the coal it loads for shipping; rather, the company is a contract handler of coal (Tr. at 18; 24-26).

On Jan. 23 and 25, 1979, an OSM inspector visited and inspected Western's river terminal. On the latter day, the inspector issued to Western Notice of Violation No. 79-II-21-1, pursuant to sec. 521 (a)(3) of the Act. Two violations of 30 CFR 715.17(a) were indicated in the notice: (1) that the surface drainage from three areas of Western's operation does not pass through a sedimentation pond and (2) that discharges from two areas of Western's operation do not meet the effluent limitations for sus-

pendent solids and pH. The company was ordered to abate the violating conditions before Feb. 7, 1979.

After the notice was issued, laboratory analysis of several water samples taken during the January 23 and 25 inspections of Western's operations revealed additional violations of the Department's interim effluent limitations for pH and iron. On Jan. 26, 1979, OSM modified the January 25 notice to include these violations.

Western filed both an Application for Review of the Notice of Violation³ and an Application for Temporary Relief⁴ with the Hearings Division of the Office of Hearings and Appeals on Feb. 6, 1979. A hearing on the latter application was held on Feb. 9, 1979, in Evansville, Indiana. At the conclusion of this hearing the ALJ ruled from the bench and denied Western's request for temporary relief.⁵ On Mar. 7, 1979, the ALJ issued a written decision confirming his bench ruling.

³ This application was filed pursuant to 43 CFR 4.1161. The regulations in 43 CFR, governing procedures for hearings and appeals, can also be found in 43 FR 34376-34400 (Aug. 3, 1978).

⁴ This application was filed pursuant to 43 CFR 4.1261.

⁵ The ALJ's findings and order are recorded in the transcript of the hearing at 129-30:

"1. On or about January 23, 1979, applicant Western Engineering, Incorporation, [sic] was engaged in 'surface coal mining operations', as that term is defined in Section 701 (28) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S. Code 1291 (28)).

"2. On or about January 23, 1979, applicant, Western Engineering, Incorporated, was operating under and subject to the provisions of the Surface Mining Control and Reclamation Act of 1977 (Public Law 95-87, — that's Public Law, PL 95-87, — and 91 Stat. 468, 30 U.S. Code 1201 et sequitur.)

On Mar. 7, 1979, Western filed with the Board its Notice of Appeal from the decision of the ALJ. The Board ordered expedited briefing of the matter; Western filed its brief on Mar. 19, 1979, and OSM filed a reply brief on Mar. 30, 1979. The Board granted subsequent motions by each of the parties to file supplemental briefs, which were received by the Board, Apr. 18, 1979, from Western, and Apr. 27, 1979, from OSM. On May 24, 1979, the Board heard oral argument on the matter.

"3. Notice of violation 79-II-21-1, dated January 25, 1979 and amended on January 26, 1979 alleges that the applicant firm has violated 30 CFR 715.17 in a matter specifically set forth, therein.

"4. The Secretary or his authorized representative has not ordered a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the conditions, practices or violations alleged in Notice of Violation 79-II-21-1, nor has the applicant firm ceased, slackened or modified its coal mining operations as a result—as a direct or indirect result of the issuance of said notice of violation.

"5. In support of its application for temporary relief, the applicant firm has failed to show that there is a substantial likelihood that the decision herein would be favorable to the applicant firm.

"6. Similarly and also in support of its application for temporary relief, the applicant firm has failed to show that the granting of such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air or water resources.

"The order being entered then will read as follows: Based upon the testimony adduced at the Hearing conducted on February 9, 1979 by the undersigned in Evansville, Indiana, a location within the locality of the permit area and one which was selected by applicant firm's counsel, on applicant firm's request for a temporary relief and a Hearing in which both parties were granted an opportunity to be heard, the applicant firm's application for temporary relief is herein denied. Further administrative proceedings in the matter of the violations alleged in notice of Violation 79-II-21-1, are in order and an evidentiary hearing in connection, therewith, will be subsequently scheduled."

Issues

There are three issues presented on appeal. The first is whether Western's river terminal operations constitute "surface coal mining operations" within the meaning of this term as it is used in the interim regulations; the second is whether OSM has authority to issue a notice of violation to an entity which does not hold a State mining permit; and the third is whether sec. 521(a) (1) of the Act requires, during the initial regulatory program, that OSM notify the State regulatory authority at least 10 days prior to issuing a notice of violation.⁶

Discussion and Conclusions

[1] Western's principal argument in support of its appeal, and that which was the focal point of the hearing and oral argument, is that its river terminal operations are not "surface coal mining operations" within the meaning of this term in the Act and interim regulations. Thus, the starting point for our analysis is the definition of this term set forth in the interim regulations at 30 CFR 700.5:⁷

(1) *Activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of*

⁶ Because of our holding with respect to the principal issue presented in this appeal, we do not reach in this decision the other issues presented, except to note that the operation of sec. 521(a)(1) of the Act during the initial regulatory program is controlled by our recent decision in *Dayton Mining Co., Inc. and Plateau, Inc.*, 1 IBSMA 125, 86 I.D. 241 (1979).

⁷ Essentially the same definition of "surface mining operations" appears in the Act in sec. 701(28), 91 Stat. 445, 516, 30 U.S.C.A. § 1291(28).

Section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: provided, however, that such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16% per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal exploration subject to Section 512 of the Act; and (2) *The areas upon which such activities occur or where such activities disturb the natural land surface.* Such areas shall also include any adjacent land, the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage and excavation, workings, impoundments dams, ventilation shafts, entryways refuse banks, dumps, stockpiles, overburden piles, spoil banks, cum [sic] banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to such activities. [Italics supplied.]

The *activities* embraced by this definition are, in general terms, those "conducted on the surface of lands in connection with a surface coal mine * * * , the products of which enter commerce or the operations of

which directly or indirectly affect interstate commerce." (Italics supplied.) The definition also embraces the areas of land "upon which such activities occur" and those areas otherwise disturbed by "such activities."

The phrase "in connection with a surface coal mine" apparently supplies a basic parameter for a determination as to the types of activities and areas of land which comprise "surface coal mining operations."⁸ This phrase, however, is not expressly defined in the Act or interim regulations, and the sentence of the definition which provides examples of activities conducted "in connection with a surface coal mine" is rather ineffectively drafted:

Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce *at or near the mine site*: * * *
[Italics supplied.]

Were this sentence more clearly structured, we might more easily rely on it to determine whether the coal processing activities conducted by Western, geographically independent from any particular coal

mine, were meant by Congress and the Secretary to be considered "surface coal mining operations" in and of themselves. As the sentence stands, however, its language admits both to the reading that the words "other processing or preparation" are modified by the words "at or near the mine site" and the reading that such activities are not syntactically connected to this qualifying phrase.⁹

⁸ It is OSM's position that the language of the definition which embraces Western's activities is: "or other processing or preparation, loading of coal for interstate commerce at or near the mine site." See OSM's Brief, filed Mar. 30, 1979, at 8. (It was established at the hearing that Western crushes and loads coal in preparation for its shipment in interstate commerce. See Tr. at 16-18; 41-45.) As the text of our opinion suggests, we agree with OSM to the extent that if any part of the subject sentence may be said to embrace Western's activities, it is that part cited to us by OSM.

According to OSM, Western's activities may be said to be conducted "at or near" the mines from which the company receives coal, because the operators of these mines have voluntarily chosen to send their coal to Western's facility rather than somewhere else. OSM's Brief, filed Mar. 30, 1979, at 10. We find the criterion of "economic incentive," suggested by OSM's argument, not supported by the interim regulations as the basis for determining whether a given activity is located "at or near the mine site."

Alternatively, OSM argues that the phrase "at or near the mine site" modifies only the words "loading of coal" and not the full phrase: "the cleaning, concentrating, or other processing or preparation." OSM's Brief, filed Mar. 30, 1979, at 10. Thus, OSM would exercise authority over Western's operations, based on the company's "processing" or "preparation" activities, without regard to the geographical relationship between those and any surface coal mines. In support of this proposition, OSM relies heavily on certain comments published in the Preamble to the permanent regulations. See *id.* at 10-11; OSM's Supplemental Brief, filed Apr. 27, 1979, at 2-4.

We do not find the provisions of the permanent regulations persuasive or even relevant in the context of this appeal. To begin with, they were not published in their final form

⁸ Western does not receive any coal from underground coal mines; therefore, we omit in our discussion reference to the language: "or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine." 30 CFR 700.5(1).

Because of the ambiguous quality of the definition of "surface coal mining operations," we have looked to the legislative history of the Act and to the interim regulatory provisions as a whole to ascertain whether the Secretary intended that activities such as Western's be treated as surface coal mining operations. In this examination, we have found the legislative history to be of no appreciable aid¹⁰ and the interim regulations,

until Mar. 13, 1979 (44 FR 14902-15463), whereas the notice of violation under our review was issued on Jan. 25, 1979. Thus, Western did not have the benefit of interpretive comments contained in the Preamble to the permanent regulations when it engaged in the activities which are the subject of the notice of violation. Moreover, we note that there are differences between the permanent regulatory provisions and the interim regulatory provisions which reflect the interpretation of the definition of "surface coal mining operations" which is implemented in the former. See comment 8, 44 FR 14915 and 44 FR 15377 (Mar. 13, 1979) (to be codified in 30 CFR 785.21).

¹⁰ Among the contents of the legislative history of the Act that have been considered by the Board, in this context, is a portion of the House Report for H.R. 2 (cited to us by OSM in its Brief, filed Mar. 30, 1979, at 11-12) which provides:

"H.R. 2 is the descendent of a number of bills dating back to the 92d Congress. Although the Congress passed two bills (in the 93d and 94th Congresses), both met a Presidential veto. As new environmental problems were identified and mining practices evolved, the bills were amended so that it can be rationally asserted that H.R. 2 now benefits from a 6-year evolution being 'fine-tuned' and updated as it moved through the legislative process. The fundamental concept of 'the strip mining bill', however, has remained constant. Thus H.R. 2 is like its predecessors in that it would enact a set of national environmental performance standards to be applied to all coal mining operations and to be enforced by the State with backup authority in the Department of the Interior. More specifically, H.R. 2 will implement a national system of coal mining regulation by—

"(1) Covering all coal surface mining (contour, mountain-top, area stripping and open-pit operations) and the surface impacts from

as a whole, do not provide us with conclusive guidance as to the nature of the "connection" with a surface coal mine which the Secretary intended to have trigger the application of the interim performance requirements.¹¹ We have decided to resolve these ambiguities in favor of Western, rather than burden that company with the assumption that the Secretary intended that activities such as those it conducts should be subject to the performance standards of the initial regulatory program.¹²

underground mines and coal processing; * * *." H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 57 (1977).

This language does refer to "coal processing" as being within the coverage of H.R. 2, from which the Act directly emanated. It does not, however, establish that coal processing which does not occur as part of the complex of activities which physically make up a particular coal mine site is governed by the performance provisions of the Act and interim regulations. See also n. 11, *infra*.

¹¹ While many of the performance requirements of the interim regulations, when read in isolation, appear suited to the types of activities conducted by Western—as a means of controlling the environmental impact of those activities, see, e.g., 30 CFR 715.17, which is the provision Western was cited for violating—many others appear to have as their reference points coal mine sites. See especially 30 CFR 715.11(b) and (c) which set forth part of the general performance obligations apparently applicable to all surface coal mining operations, including the requirement that copies of a mine map be submitted to the state regulatory authority and OSM).

¹² See *Cole v. Young*, 351 U.S. 536, 556 (1956); *F.T.C. v. Atlantic Richfield Co.*, 567 F.2d 96, 103 (D.C. Cir. 1977); *Tobin v. Edward S. Wagner Co., Inc.*, 187 F.2d 977, 979 (2d Cir. 1951), wherein Circuit Judge Frank stated:

"Beginning at least with Aristotle, it has often been recognized that, as a legislature cannot foresee all possible particular instances to which legislation is to apply, it must therefore be reasonably so interpreted to fill in gaps. * * * But when the legislature dele-

For the foregoing reasons, we hold that Western's river terminal operations do not constitute surface coal mining operations. We therefore reverse the ALJ's decision and remand this case to the Hearings Division for action consistent with this decision.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

gates to an administrative official the authority, by 'sublegislation', to issue regulations, in order to fill in those gaps, then the regulations, precisely because they particularize, ought not be as generously interpreted as the statute. In fairness to the regulated, the provisions of the regulations should not be deemed to include what the administrator, exercising his delegated power, might have covered but did not cover. * * * (Footnote omitted.)

This is not to suggest that mere ambiguity alone will yield the same result. We are mindful of what the Supreme Court stated in *Achilli v. U.S.*, 353 U.S. 373, 379 (1957), "[o]ur duty is to give coherence to what Congress has done within the bounds imposed by a fair reading of the legislation." In this search for coherence, administrative construction of ambiguous provisions is entitled to great weight. *Consumer Life Ins. Co. v. U.S.*, 524 F.2d 1167, 207 Ct. Cl. 638 (1975), *aff'd*, 430 U.S. 725 (1977); *Continental Cas. Co. v. U.S. for Use and Benefit of Robertson Lumber Co.*, 305 F.2d 794 (8th Cir. 1962); *cert. denied*, 371 U.S. 922 (1962). The "administrative construction" in the present context is the construction adopted by this Board, unless the Secretary changes the disputed provision. It is our responsibility, just as it is the Court's, to give "coherence * * * within the bounds imposed by a fair reading of the legislation" to ambiguous enactments and regulations. In discharging that duty we can and will attempt to resolve ambiguities by examining other evidence of intent. However, when all aids to construction do not eliminate this ambiguity, as they did not in this case, a similar resolution should not be surprising.

FRANK RULLAND

41 IBLA 207

Decided June 27, 1979

Appeal from decision of the Fairbanks District Office, Bureau of Land Management, rejecting in part Native allotment application F-14641.

Set aside and remanded.

1. Administrative Procedure: Generally—Alaska: Native Allotments—Contest and Protests: Generally—Hearings—Rules of Practice: Government Contests

Where the Bureau of Land Management (BLM) determines that an Alaska Native allotment application should be rejected in part because the Native did not use all of the land applied for, the BLM shall initiate a contest proceeding pursuant to 43 CFR 4.451 *et seq.*

2. Alaska: Native Allotments—Alaska: Navigable Waters—Alaska: Statehood Act—Alaska: Tidelands—Public Lands: Generally—Submerged Lands—Submerged Lands Act: Generally

Federal title to land may be lost by erosion, and land which has become submerged under water is no longer subject to disposition under the Alaska Native Allotment Act. The fact that an Alaska Native may have used, occupied, and filed an application for such land when it was dry does not prevent the loss of Federal title to that land by erosion. Neither the Alaska Statehood Act nor the Submerged Lands Act prevents the passage of title to such land to the State.

APPEARANCES: Carmen L. Massey, Esq., Alaska Legal Services Corp., for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON
INTERIOR BOARD OF LAND APPEALS

Frank Rulland has appealed from a decision, dated Sept. 16, 1975, of the Fairbanks District Office, Bureau of Land Management (BLM), which rejected in part his Native allotment application F-14641, which had been filed pursuant to the Alaska Native Allotment Act, ch. 2469, 34 Stat. 197 (1906) (repealed 1971). The decision considered appellant's applications for two parcels of land. Appellant's application for Parcel A included 125 acres, but the District Office found that Mr. Rulland was only using a small part of Parcel A and allowed only 40 acres. The District Office rejected the application for Parcel B because the field report indicated that the land was completely under the water of the Beaufort Sea and that the land now belongs to the State of Alaska pursuant to the Alaska Statehood Act, 72 Stat. 339 (1958), which gave the State title to such submerged land as defined in the Submerged Lands Act, 43 U.S.C. §§ 1301-43 (1976).

[1] While this appeal was pending, the United States Court of Appeals for the Ninth Circuit ruled that "Alaska Natives who occupy and use land for at least five years, in the manner specified in the [Native Allotment] Act and the regulations," are entitled to due process in the adjudication of their appli-

cations for allotment of that land. *Pence v. Kleppe*, 529 F. 2d 135, 141-42 (9th Cir. 1976). The Department implemented this mandate by requiring BLM to initiate a contest giving an applicant notice of the charges against his/her application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application because of insufficient use and occupancy. *Donald Peters*, 26 IBLA 235, 83 I.D. 308 (1976), *sustained on reconsideration*, 28 IBLA 153, 83 I.D. 564 (1976). Those contest procedures are set forth at 43 CFR 4.451-1 to 4.452-9. In *Pence v. Andrus*, 586 F. 2d 733 (9th Cir. 1978), the court held that these procedures comply with the due process requirements mandated in *Pence v. Kleppe*, *supra*. Consideration of appellant's appeal was stayed pending resolution of the issues raised in the *Pence* litigation.

The rejection of Parcel B and the partial rejection of Parcel A were predicated on factual determinations. The applicant has not had an opportunity to submit evidence on these factual issues at a hearing. The cases must therefore be remanded to the Bureau for readjudication. Where it is determined that the applications should still be rejected in whole or in part because of the failure of the record to establish the applicant's use and occupancy of the land as required by statute and regulation, BLM should initiate a contest proceeding in accordance with our decision in *Donald Peters*, *supra*.

[2] With respect to Parcel B, appellant asserts that even if the land eroded, his claim of entitlement arising from his prior use and occupancy was preserved by various provisions of the Submerged Lands Act and the Alaska Statehood Act.¹

¹Appellant points to a provision of the Alaska Statehood Act in which the United States and Alaska disclaimed right and title to land held by the United States in trust for the Natives. Appellant further cites a provision of the Submerged Lands Act, 43 U.S.C. § 1315 (1976), which provides that nothing in the statute shall affect rights which may have been acquired under any other law of the United States. He points to another provision, 43 U.S.C. § 1313(b) (1976), which excludes from those lands granted to a State any lands beneath navigable waters held for the benefit of any tribes, band, or group of Indians or for individual Indians. However, appellant has initiated no interest which is not subject to loss by erosion. Indeed, even if a patent had been issued while the land was fast land, title conveyed by the patent would be lost by erosion.

The issue may be more fully appreciated if the basic law governing title to submerged land is set forth. It has been long recognized that prior to the admission of a State to the Union, the United States holds title to the lands beneath navigable waters in trust for the future state. *Shivley v. Bowlby*, 152 U.S. 1, 49 (1894); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Young v. Town of Juneau*, 4 Alaska 372 (1911). When territories became states, they received title to submerged land just as the original states held title to their submerged lands. See *Shivley v. Bowlby*, *supra*. Thus, the Submerged Lands Act confirmed the title of submerged lands in existing states and defined the title that future states would acquire. Even though the land was kept in trust for future states, a number of cases recognize that prior to admission of the state, the Government may reserve lands beneath navigable waters so that they do not pass to the state upon attainment of statehood. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *United States v. City of Anchorage*, 437 F.2d 1081 (9th Cir. 1971); *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946). In each case, the court found an intent to reserve land beneath navigable waters in the instrument of conveyance or reservation. These cases contrast with the instant case where there is no instrument where such an intent can be found. As we noted in the body of the opinion, recognition of such an exception would not be consistent with the intent of the Native Allotment Act.

He asserts that if his land eroded, this occurred only after he had earned his right to it by use and occupancy and after he had filed his application. However, it is not by virtue of the legislation that the land is no longer subject to disposal under the Native Allotment Act. Rather, this result follows from the application of the common law principle that Federal title to public land may be lost by erosion. *J. M. Jones Lumber Co.*, A-30761, 74 I.D. 417 (1967); see generally 65 C.J.S. *Navigable Waters* § 87 (1966). Courts have applied the concepts of erosion, accretion, and avulsion, making clear that these principles were not suspended by the Submerged Lands Act or the various statehood acts. See *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973); *Hughes v. Washington*, 389 U.S. 290 (1967).² Such principles are no less applicable in Alaska. See *Sandra L. Lough*, 25 IBLA 96 (1976).

Furthermore, it would not be appropriate to assert that lands in-

² *Bonelli*, *supra*, had held that Federal common law rather than State law was to be applied in a dispute between Arizona and a land holder in that State involving a question of title to land which had been the bed of a navigable river. *Corvallis*, *supra*, overruled *Bonelli* on this point, and held that state law rather than Federal law controlled. *Corvallis* does not preclude the application of Federal common law to lands bordering on oceans, see *Hughes v. Washington*, *supra*, or to questions of title to public lands. See *David A. Provinsse*, 35 IBLA 221, 85 I.D. 154 (1978).

The only possibility that submerged lands might be retained in Federal ownership is if such lands were clearly embraced within a Federal withdrawal prior to and at the time of statehood. See *Solicitor's Opinion*, 86 I.D. 151 (1978).

June 28, 1979

cluded in a Native allotment application are somehow excepted from the application of these common law principles. The type of use and occupancy which the Native Allotment Act sought to protect can no longer be enjoyed if the lands are submerged. Even if title to the land remain in the United States, this same reasoning would impel the rejection of the application pursuant to the Secretary's discretionary authority under the Native Allotment Act, because granting an allotment for submerged land would be inconsistent with the intent and purpose of that statute. If appellant disputes the factual determination that Parcel B is submerged, however, this factual issue may be considered at the hearing.

We are not ruling at this time on the adequacy of appellant's asserted use and occupancy as required by the Native Allotment Act. Resolution of legal issues related to that question will best be made after the hearing where all the facts have been ascertained. The facts should establish the type and extent of the use, whether others may have used and occupied the land, whether there may have been a failure to substantially continue to use or occupy land or an abandonment of the land by the applicant for a substantial period from the time asserted to the date of the application, and all other matters which would show the factual basis for ascertaining whether compliance with the preconditions for granting a Native allotment have been satisfied.

BLM should afford notice of the initiation of the contest proceedings to the State of Alaska and any other person or entity which may possibly have a conflicting interest in the land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further adjudication.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

JAMES L. BURSKI,
Administrative Judge.

NEWTON FRISHBERG,
Chief Administrative Judge.

FLOYD L. ANDERSON, SR.

41 IBLA 280

Decided June 28, 1979

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-8052.

Affirmed.

1. Alaska: Native Allotments—Settlements on Public Lands—Withdrawals and Reservations: Generally—Withdrawals and Reservations—Effect of

A Native allotment applicant, who was 5 years old at the time when the land was withdrawn from all forms of appropriation, is properly deemed to be incapable as a matter of law of having

exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently the allotment application is properly rejected.

2. Alaska: Native Allotments—Settlements on Public Lands

An allotment right is personal to one who has complied with the laws and regulations. An applicant for a Native allotment may not rely or tack on use and occupancy of the land by his ancestors to establish his right.

3. Alaska: Indian and Native Affairs—Alaska: Land Grants and Selections: Applications—Indian Allotments on Public Domain: Lands Subject to—Indian Allotments on Public Domain: Settlement

Settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of Mar. 4, 1927, 43 U.S.C. §§ 316, 316a-316o (1976), does not create any rights by virtue of such settlement under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by 43 U.S.C. § 1617 (1976), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease *pro tanto*, but the grazing lease does not preclude the filing of a state selection application which, when filed, segregates the land from all appropriation based upon settlement or location.

4. Administrative Procedure: Hearings—Evidence: Generally—Hearings

Where legal conclusions are reached in an appellate decision upon undisputed facts, and there has been no proffer of further facts which could compel different legal conclusions, no useful purpose would be served for a hearing, and a request therefor is properly denied.

APPEARANCES: Mathew D. Jamin, Esq., Alaska Legal Services Corp., Kodiak, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

Floyd L. Anderson, Sr., has appealed from a decision dated Dec. 12, 1975, by which the Alaska State Office, Bureau of Land Management (BLM), rejected his Native allotment application AA-8052, filed for fractional SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 29, T. 26 S., R. 20 W., Seward meridian, Alaska, pursuant to the Native Allotment Act of May 17, 1906, *as amended*, 43 U.S.C. § 270-1 (1970), (repealed, except for pending applications, by sec. 18(a), Alaska Native Claims Settlement Act of Dec. 18, 1971, 43 U.S.C. § 1617 (1976)).

The BLM decision recited that the Native Allotment Act applies only to vacant, unappropriated and unreserved public lands in Alaska, and where lands have been segregated or withdrawn, allotment may only be made where the Native made substantial use and occupancy of the land for at least 5 years prior to the effective date of the segregation or withdrawal, and that the land sought by Anderson was withdrawn by Exec. Order No. 8344 of Feb. 10, 1940, from appropriation under the public land laws. The Executive Order did not prohibit issuance of a grazing lease under the Act of Mar. 4, 1927, 43 U.S.C.

§§ 316, 316a-316o (1976); such a grazing lease, A 034760, was issued Jan. 1, 1957, to one DeWitt W. Fields. PLO No. 2417 of June 26, 1961, revoked Exec. Order No. 8344, but did not open the land within any grazing lease to operation of the public land laws. Such lands remained as appropriated and segregated from entry until such time as they are classified as suitable for disposal under the public land laws.

The State of Alaska filed State selection application A 056426 and amended it as of Oct. 29, 1963, to embrace all available land in T. 26 S., R. 20 W. The grazing lease of Fields did not preclude the State selection as the State would accommodate the existing Federal grazing lease by replacement with a State lease. *Harold J. Naughton*, 3 IBLA 237, 78 I.D. 300 (1971).

[1] As the land in issue has not been open to settlement at any time since Feb. 12, 1940, Anderson could initiate no right thereto by settlement, use or occupancy commenced after that date, so his use and occupancy after 1961, as alleged in his application, may not be recognized. Further, it was pointed out that as Anderson was born May 28, 1934, he could not have made any recognizable use of the land before it was withdrawn in 1940. Even taking appellant's claim of occupancy at its face value, we cannot agree that it vested him with any rights to the land at issue. At the time of the withdrawal of Feb. 12, 1940, appellant was 5 years old. We hold that

as a matter of law he was too young to have exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently his application must be rejected. *James S. Picnalook, Sr.*, 22 IBLA 191 (1975); *Emma Moses*, 21 IBLA 264 (1975).

In *Susie Ondola*, 17 IBLA 359 (1974), we held that: "Assertions to the effect that a child two years of age exerts independent control and use of land, to the exclusion of her parents, siblings and others flies in the face of reason. *Helén F. Smith*, 15 IBLA 301 (1974); *Arthur C. Nelson*, 15 IBLA 76 (1974)."

In *Minnie E. Wharton*, 4 IBLA 287, 79 I.D. 6 (1972), *rev'd on other grounds*, 514 F. 2d 406 (9th Cir. 1975), in discussing the capacity of an infant to be a holder of land in adverse possession, a concept similar to the one here in issue, we stated at 4 IBLA 300, 79 I.D. 12 as follows:

It does not comport with reason that John Wharton, who was born on the land in 1933 and purportedly lived there until 1966 was, in his childhood, aware of, or concerned with, the ownership of the land. To suggest that he, in 1933 or shortly thereafter, as a baby or young child, was holding the land in open notorious adverse possession, suggests a faculty for comprehension in a baby or young child which flies in the face of reason. The fact that the other appellants, apart from Minnie E. Wharton and John W. Wharton had been born on the land and lived there until they were emancipated, simply does not lend any persuasive force to the assertion that

they held the land in open notorious adverse possession.

We recognize the existence of authority for the proposition that one who has not reached his majority may acquire title to land by adverse possession, 3 AM. JUR., Adverse Possession sec. 131. However, there must be an intention to disseise.

While we recognize that in some circumstances a 5-year-old may be competent as a witness (*See Annot.*, 81 ALR 2d 386, 398-9 (1962)), such a child would be regarded as incapable of committing a tort requiring malice, e.g., libel. *Munden v. Harris*, 153 Mo. App. 652, 134 SW 1076 (1911); *Drane v. Pawley*, 8 Ky. LR 530 (abstract) (1886). *Cf. Annot.* 2 ALR 2d 1329, 1330 (1948).

The statement of reasons argues that an applicant for a Native allotment may tack on ancestral use of the land to avoid the segregative effect of later withdrawals, such as Exec. Order No. 8344 made in this case; if tacking on is not permitted, PLO No. 2417 revoked Executive Order in 1961, and the failure of the State of Alaska to file a selection application within 6 months during the stated preference right period allowed appellant to establish his allotment, except for the existence of the grazing lease of Fields, which appellant contends could not affect the land he seeks because BLM did not determine the Native use and occupancy prior to the purported issuance of the grazing lease.

[2] At the outset, we point out that the issue of tacking is well settled. An allotment right is personal to one who has fully complied with

the law and regulations. An applicant for a Native allotment may not tack on use and occupancy of the land by his ancestors to establish his right. *James S. Picalook, Sr., supra*; *Emma Moses, supra*; *Louis P. Simpson*, 20 IBLA 387 (1975); *Anne McNoise*, 20 IBLA 169 (1975); *Larry W. Dirks*, 14 IBLA 401 (1974). *Cf. United States v. Arenas*, 158 F. 2d 730 (1947), cert. denied, 331 U.S. 842 (1947); *Woodbury v. United States*, 170 F. 302 (8th Cir. 1909).

[3] Similarly, the Department has held that settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of Mar. 4, 1927, 43 U.S.C. §§ 316, 316a-316o (1976), does not create any rights, by virtue of such settlement, under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1, 270-2, 270-3 (1970), repealed 43 U.S.C. § 1617 (1976), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease. *Harold J. Naughton, supra*. Although the existence of a grazing lease, issued under the Act of Mar. 4, 1927, *supra*, is effective to bar settlement of the land covered thereby, it does not preclude the filing of a state selection application for the land which, when filed, segregates the land from all appropriations based upon application or settlement or location. *Id.*

[4] We note that appellant "demands a hearing to show his ancestral use and possession, to demonstrate his own use and to demon-

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strate generally that the decision of the Bureau of Land Management in rejecting his application was erroneous." He invokes *Pence v. Kleppe* 529 F. 2d 135 (9th Cir. 1976). See also *Pence v. Andrus*, 586 F. 2d 733 (9th Cir. 1978).

The legal conclusions reached in this decision are based upon undisputed facts. There has been no proffer of further facts which could compel different legal conclusions. It appears, therefore, that no useful purpose would be served by a hearing and the request therefor is denied. *Arthur C. Nelson, (On Reconsideration)*, 15 IBLA 76 (1974).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

JOAN B. THOMPSON,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

APPEAL OF ENVIRONMENT CONSULTANTS, INC.

IBCA-1192-5-78

Decided June 29, 1979

Contract No. 14-16-0001-5782FA,
Fish and Wildlife Service.

Sustained in part.

1. Contracts: Construction and Operation: Changes and Extras

Where the Board finds that the Contracting Officer's Representative required the contractor to expend more effort in field surveys and data collection than required by the contract documents, a constructive change will be found to have occurred.

2. Contracts: Disputes and Remedies: Equitable Adjustments

Where the evidence supports entitlement of a contractor to an equitable adjustment resulting from a constructive change, but fails to establish that all the claimed extra costs were incurred as a direct result of the constructive change, the Board will employ the jury verdict approach in order to determine the appropriate amount to be awarded to the contractor.

APPEARANCES: Messrs. Yan M. Ross, William H. Barrett, Attorneys at Law, Metzger, Shadyac & Schwarz, Washington, D.C., for appellant; Ms. Jean P. Lowman, Mr. Lawrence E. Cox, Government Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Factual and Procedural Setting

On Mar. 20, 1975, a contract was entered into between the United States of America, acting through the Contracting Officer of the Fish and Wildlife Service (FWS), Department of the Interior (Government and Environment Consultants, Inc. (ECI), a Delaware corporation having its principal

place of business at Dallas, Texas. The contract included the general provisions of the standard supply contract Form 32, with two attachments: Exhibit A, "A General Prospectus for Certain Wildlife and Habitat Survey and Inventory Services for American Samoa," and Exhibit B, "A Proposal for a Survey and Inventory of Wildlife and Wildlife Habitat of the Islands of American Samoa" (AF-B).¹

According to the General Prospectus, Exhibit A of the contract, the purpose of the contract was to obtain "the services of a consultant to complete a basic survey and inventory of the wildlife and wildlife habitat of American Samoa."² The need for such a survey was stated to be that it would serve as a threshold for investigations on specific wildlife conservation problems; would provide facts needed by administrators in making judgments on conservation issues; and would pinpoint rare, threatened, or endangered species that may be

located on the Islands. It was also pointed out that although American Samoa has not been subjected to extensive habitat degradation, there have been developments which have had adverse impacts; that the population growth from 5,000 in 1900 to 28,000 in 1972 has precipitated problems such as soil erosion, development of adequate supplies of fresh water, garbage disposal, and pollution abatement; and that knowledge of the biotic systems of the Islands must be available if serious detrimental effects are to be avoided in the future.

The contract provided for a performance period of two (2) years; for a contract price of \$200,000 with progress payments to be made monthly based upon billings approved by the Project Officer for the Government and with 20 percent retention to be paid at the end of the contract period; for ECI to provide the necessary technical and supervisory personnel, transportation, materials, and equipment to accomplish the objectives as outlined in Exhibits A and B attached to the contract; and for the Government to arrange for the rental of certain equipment and office space from the Territory of American Samoa.

Exhibits A and B of the contract, prepared respectively by the Government and ECI, are practically identical in terms of setting forth the primary and secondary objectives of the contract.³ However,

³ The General Prospectus, Exhibit A, prepared by the Government, provides as follows: "PRIMARY OBJECTIVES

¹ Appeal File, Exhibit B.

² The General Prospectus contained the following background on American Samoa:

"American Samoa is located at about 14 [degrees] South latitude and 170 [degrees] West Longitude and is comprised of seven islands whose total land area is approximately 76 square miles. The islands are mountainous and jungle covered. They have steep shorelines and rather narrow fringing reefs. The highest elevation on the largest island, Tutuila, is 2,141 feet while the highest elevation in the entire group is found on Ta'u at 3,056 feet. Six of the seven islands are inhabited; the total population consists of about 28,000 Samoans and about 800 people from elsewhere. The yearly average temperature range is between 70 [degrees] F. to 90 [degrees] F., with a humidity of about 80%. The annual rainfall at Pago Pago is about 200 inches with most of this falling from December to March."

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there are certain provisions of the contract which play key roles in the resolution of the dispute presented by this appeal.

Paragraph 26, entitled "Representations," on page 4 of the contract, provides as follows:

The Contractor represents that it is qualified, willing and able to perform the work of this contract and is performing work in a similar or related field. The Contractor shall, as an independent contractor, use its best efforts to supply the necessary personnel, facilities and do all other things *which in its judgment are necessary for or incidental to the performance of the work of this contract which shall be under the supervision of the Project Officer.* The Contractor shall use its best efforts to complete performance of this contract, including preparation of the final technical report, within

"1. Define the major ecologic types (plant communities) which collectively make up American Samoa.

"a. Describe each generally in terms of soils, moistures, light, slope, altitude, etc.

"b. Identify the plant species which characterize each.

"c. Identify the wildlife species present in each, noting seasonal occupancy and approximate population density for each. Wildlife is defined to include mammals, birds, reptiles and amphibians.

"2. Prepare maps of American Samoa showing the distribution of the ecologic types (1. above).

"3. Describe the roles of disturbances and succession as determinants of plant/animal communities.

"4. Identify and record the status of any species (plant or animal) threatened with extinction or expiration and describe the factor(s) responsible.

"5. Identify management opportunities and options and future research needs.

"SECONDARY OBJECTIVES

"1. Determine the effects on the polynesian rat on turtles and birds at Rose Atoll."

Exhibit B of the Contract, the Proposal prepared by ECI, was nearly the same as Exhibit A with respect to the stated objectives except for minor language differences and except that the fifth primary objectives listed in Exhibit A was listed as the second secondary objective in Exhibit B.

the estimated costs and period specified. [Italics supplied.]

Paragraph 1, page 1 of the contract designates Mr. Edward S. Marvich as Project Officer for the Fish and Wildlife Service and also states as follows:

Project Officer for Environment Consultants, Inc., will be:

Dr. Daniel Coffman, Project Administrator, Dallas

Mr. Binion Amerson, Principal Investigator, Samoa

On page 2 of Exhibit A of the contract, there is an unnumbered paragraph entitled, "Description of Work to be Performed." It states as follows:

The study shall utilize procedures which can be repeated by other scientists in later years and shall conform to accepted standards of scientific excellence. Plants and animals shall be identified by genus and species, English common names, and Samoan common names. The work will entail year-round field investigation in order that seasonal fluctuations in abundance can be recorded. The end product shall be submission of a comprehensive report of the habitat and wildlife of American Samoa. It shall be of publishable quality as determined by the U.S. Fish and Wildlife Service, fully illustrated with maps, photographs, drawings and sketches. [Italics supplied.]

Another significant provision of the contract is designated as paragraph 4 and is found on page 2 of the contract. It reads as follows:

A Comprehensive Plan must be submitted within four (4) months after effective date of Contract. This Outline must include specific and measurable check points at quarterly intervals to determine progress of study. These plans must meet the approval of the Contracting Officer. Approval or comments will be expressed

in writing by the Contracting Officer within three (3) weeks of receipt by the Service. Any later changes or additions to study plans must be submitted as an amendment for approval by the Contract Officer prior to effecting the changes. The Service will respond within 10 days after receipt of request.

It is undisputed: that Mr. Marvich was responsible for conceiving and recommending that FWS undertake a survey of the wildlife and wildlife habitat of American Samoa (Tr. 401); that he was instrumental with others in writing the General Prospectus and the objectives contained therein; that after the Contracting Officer, on Dec. 12, 1973, requested proposals from prospective contractors to perform the subject contract, Mr. Marvich served on the FWS Selection Committee which reviewed and ranked the proposals (Tr. 285, 365); that ECI was selected from among seven firms chosen to meet with the Selection Committee, as the most qualified firm responding to the request for proposals (Tr. 29, 286); that the subject contract was the first for which ECI has ever competed in which the price was not discussed until after the contractor was selected; that after considerable negotiations involving revised proposals and budget options, on June 3, 1974, ECI provided FWS a "Description of Services Performed at Various Funding Levels" which compared the amounts of quantitative data collection field work which ECI proposed to undertake for \$250,000, \$221,066, \$610,443, and \$800,000 (AP-t, Exh. 1); that ECI was un-

aware, until well into the negotiations for the final contract price, that the Government's budget for this project was limited to \$200,000 (Tr. 177); that it was Dr. Coffman's opinion that the contract price was the minimum which would support the level of effort which would allow fulfillment of the goals and objectives of the Request for Proposal (Tr. 167); and that it was Mr. Marvich who signed the approvals on behalf of FWS with respect to the Preliminary Field Methods and the Refined Field Methods, even though the contract at paragraph 4, called for approval of the Comprehensive Plan by the Contracting Officer (AP-18; AP-21; AF-B).

Contentions of Appellant

The appellant contends that it prepared what were termed "Preliminary Field Methods" and "Refined Field Methods" which constituted the Comprehensive Plan required by paragraph 4 of the contract and which were tantamount, at least, to the specifications for the contract, since the Government had not provided any other specifications explaining what ECI was obligated to do and how it was to be done. The appellant also contends as follows:

1. That in Mar. 1976, the Contracting Officer's Representative (COR), Mr. Marvich, requested ECI to write a mid-project, or annual report, not required under the contract and also that ECI collect extra data outside of and in addi-

tion to the 13 study plots contained in the Refined Field Methods, because Mr. Marvich wanted "precise" estimates of population densities rather than the "approximate" estimates required under the contract;

2. That ECI performed the work requested by the COR, Mr. Marvich, which was not required by the Mar. 20, 1975, contract or the Refined Field Methods;

3. That the extra work consisted of furnishing a mid-project or annual report, performing linear surveys and undertaking 28 study plots not called for in the Refined Field Methods;

4. That ECI's claim for \$99,955 represents the expenses which ECI incurred as a result of performing the extra quantitative data collection field work required by the COR in March 1976, and which was not required under the contract; and

5. That ECI is entitled to full payment of its claim because the work it represents was requested by the COR, the work was accepted and ratified by the Contracting Officer and the COR, ECI protested that it was extra work, and the controlling equitable considerations support ECI's claim.

Contentions of the Government

The Government denies that ECI performed extra work, and contends that all work performed by ECI was necessary to fulfillment of its contractual obligation. Its specific contentions are as follows:

1. The contract was a performance contract requiring a study and final report meeting standards of scientific excellence and utilizing procedures which could be subsequently repeated.

2. FWS approval of preliminary and refined field methods did not convert the contract to a "specification" contract.

3. The work ECI claims as "extra" was required by the contract.

4. ECI failed to notify the Contracting Officer that it was performing "extra" work to the prejudice of FWS.

5. ECI has the burden of proof in showing it is entitled to an equitable adjustment.

6. ECI has a higher burden of proof in this matter for it purports to establish its quantum entitlement using a "total time" method, a variation on the total cost method.

By its letter dated Jan. 5, 1977 (which should be Jan. 5, 1978, since it was received by the Contracting Officer on Jan. 9, 1978), ECI presented a formal claim to the Contracting Officer for the alleged extra work in the amount of \$91,828. This figure was calculated by adding the salaries expended since the termination date of the contract, Mar. 20, 1977, for ECI's staff personnel, technicians, secretaries, artists, statistician/editors, coordinators, and administrators in the amount of \$39,762.49 times the ECI audited and approved overhead rate of 110 percent in effect Mar. 21, 1977, plus 12 percent profit (AF-O). On Jan. 20, 1978, Change

Order No. 1 was executed by the Contracting Officer and Paul de Cerrantes, Vice President of ECI. The primary purpose of the change order was to extend the contract date to Feb. 20, 1978, to allow FWS a review period to determine substantial performance. It also authorized release of 50 percent of the \$40,000 retainage on the date of the change order and the remaining 50 percent within 30 days, providing the final report from ECI is accepted (AF-P).

By letter, dated Feb. 17, 1978, the Contracting Officer informed ECI that the FWS staff had made the reviews of the draft report furnished by ECI on Jan. 20, 1978, and based upon those reviews he had determined that the draft report met the substantial performance requirements of Contract No. 14-16-001-5782 FA (AF-Q).

By letter dated Mar. 28, 1978, the Contracting Officer denied the claim of ECI for the increased scope and complexity of the work alleged by ECI to have been ordered by FWS. The ground for the denial was that no additional work had been ordered by either a change order or an extra work order and that sec. 3 of Standard Form 32, General Provisions of the Contract, states, "no payment for extras shall be made unless such extras and the price thereof have been authorized in writing by the Contracting Officer." (AF-R). Thereafter, on Apr. 27, 1978, the attorneys for ECI executed a Notice of Appeal addressed to the Secretary of the Interior

which was docketed by this Board on May 5, 1978 (AF-S).

Issues Presented on Appeal

1. Whether a constructive change took place in March 1976, midway in the course of performance of the subject contract, entitling appellant to an equitable adjustment for unanticipated, extra costs incurred as a result of the constructive change.

2. If entitled to an equitable adjustment, whether appellant sustained its burden of proof with respect to quantum.

Decision on Entitlement

The determination of a constructive change, in terms of extra work in this case, first of all, depends upon whether measurable work performance was limited by the contract documents. Secondly, it depends upon ECI actually performing work in addition to the contract requirements at the request of the Government, and thirdly, if the extra work was performed, whether the Contracting Officer knew, or should have known, that ECI considered the extra work to be beyond the scope of the contract and expected to be paid for it.⁴

⁴ In R. Nash, *Government Contract Changes* (1975), at p. 219, the author states:

"The most straightforward type of constructive change occurs when the Government, during contract administration, takes some action which increases the cost of the work, believing the action to be proper under the terms of the contract. If the contractor can later convince contracting officials in the procuring agency or an appeals board that the extra work was not required by the contract, the action will be held to be a constructive change and the contractor will be entitled to compensation for the extra costs that have been incurred.

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It is undisputed that the contract called for a Comprehensive Plan to be submitted by ECI for approval by the Contracting Officer; that in response to that requirement, ECI did prepare and submit, and the Government approved over the signature of Mr. Marvich, a document designated as, "Refined Field Methods for a Survey and Inventory of Wildlife and Wildlife Habitat of the Islands of American Samoa" (AP-19; AP-21).⁵ It is evident upon reading that document that it detailed the work performance and methodology that ECI would undertake in order to meet its obligations under the subject contract.

For example, at pages 2 and 3, it specified that major community types would be sampled and would include all distinct primary and secondary plant communities; that because of the lack of a large assortment of soil types on Samoa, the major community types are best differentiated by physiographic regions rather than by soil types. Table 1, page 4, shows the three main physiographic features of the Islands to be the Strand Formation with 5 zones, the Forest Formations with 6 zones, and the Summit and Ridge Formations with 2 zones.

F.N. 4—Cont'd.

"There are three major issues that arise in such situations:

"1. Can the act of the Government be traced, in some way, to an employee with Contracting Officer authority?

"2. Was the extra work done beyond the requirements of the contract?

"3. Did the contractor take the proper precautions in notifying the Government of the consequences of the act?"

⁵ Appellant's Exhibit No. 19 and appellant's Exhibit No. 21.

These 13 zones constituted the major study and sampling units upon which ECI organized and focused its endeavor.⁶

On page 5, the Refined Field Methods states that a number of replicates will be sampled for each major plant community on each Island in order to determine differences between Islands. On pages 7 and 8 is an explanation of sampling methodology. There, among other things, it is stated: that a form of interrupted belt transect will be more reliable than a large single compact plot; that in conjunction with the belt transect, the point-centered quarter method will be utilized for special situations and reconnaissance-type surveys and a single compact plot may be utilized for specialized, discontinuous vegetational areas; and that the belt transect consisting of 10m x 10m (100m²) plots spaced at 10m intervals will be set out in selected representative sampling sites for each major community type.⁷

⁶ On pages 2 and 3 of AP-19 is the following explanation:

"Primary communities are those communities, both climax and subclimax but not necessarily virgin, that by their composition and structure are most indicative of the natural vegetation of the Islands of American Samoa. Secondary communities are either man-dominated plant communities resulting from the removal or alteration of the existing natural vegetation or secondary successional communities resulting from past man-influenced or natural disturbances."

⁷ Dr. Daniel Coffman, scientist and Project Officer for ECI, testified at transcript pages 182-183 that "ecosystems," "major plant communities," "primary study plots," "community habitats," and "sample sites," are all terms referring to the same areas, but are not synonymous on a biological definition basis. He also pointed out that initially,

We find that the contract documents, including the Refined Field Methods, did limit the work which the Government could reasonably expect ECI to perform for the contract price of \$200,000. We also find that after approval by the Government, the Refined Field Methods were tantamount to, and served the same function as, contract specifications. We also find that the Refined Field Methods specified what ECI intended to do and how it intended to do it in meeting the contract objectives, so that any effort required by the Government to be performed by ECI beyond what was specified in that document could reasonably be held to be extra work.

The Government does not deny that ECI performed the work alleged by ECI to be extra. It simply argues that that work was not extra, but was required by the contract to meet the objectives and the standard of "scientific excellence" set forth in the General Prospectus (Govt. Br. pp. 8-9). We reject this argument because the record is clear that the additional work performed by ECI, consisting of linear surveys, additional field collection work, and the mid-project or annual report, were not called for in the Refined Field Methods. Therefore, pursuant to our last above finding, that work was "extra," and we so find.

We now come to a discussion of the third element required before a

determination can be made that a constructive change occurred. Did ECI sufficiently notify the Government that it considered the extra work to be beyond the scope of the contract and therefore, compensable? We hold that it did.

The Annual Status Report itself, in the Preface, contained the following sentence: "*Although such a document is not required by the contract*, both parties agreed that the goals of the project would best be served by a compilation of progress and findings of the work to date * * *" (italics supplied) (AP-33). This report was dated April 1976 and was transmitted to FWS by letter from Daniel M. Coffman, Ph. D., addressed to Edward S. Marvich, and dated Apr. 23, 1976 (AP-32).

At the hearing, ECI introduced a memorandum to the file dated Mar. 26, 1976, written by Dr. Coffman and memorializing his trip to Samoa and the March meetings (AP-29). That document was not in any way challenged by the Government. It appears to have been made in the ordinary course of business. We have no reason to doubt its authenticity. It clearly stated that Mr. Marvich was told that the annual report and linear surveys represented effort beyond the scope of either the contract or the Revised Field Methods.⁸

F.N. 7—Cont'd.

there was to be one quadrant or sample plot in each of the 13 major ecosystems, but that after the Preliminary Field Methods (AP-17) had been tested in the field, the methodology was changed to a system of belt transects.

⁸ The last two paragraphs of that document (AP-29) are as follows:

"In spite of contractual specifications on the use of plots for data collection, Amerson concurred with Marvich's opinion that transect observations between plot sites would contribute substantially to the quality of the

Dr. Coffman testified, at Tr. 117-118, as follows:

Q. At the March 19th meeting did Mr. Marvich request that ECI undertake data—quantitative data collection—outside of the thirteen study plots?

A. Yes, he did.

Q. And did you tell him that the quantifying data collection efforts beyond the thirteen study plots was work outside the contract?

A. Yes.

Binion Amerson, the principal investigator for ECI on Samoa, who was present at the Mar. 16-19, 1976, meetings, verified that Dr. Coffman told Mr. Marvich that the additional work and the annual report were not called for in the original contract (Tr. 235).

Mr. Marvich himself, at Tr. 427-428, testified that although Dr. Coffman did not "expressly" tell him on Mar. 19, 1976, that ECI was not required under the contract to write the mid-project report, Dr. Coffman did have such a conversation with him sometime during the March 1976 meetings or subse-

quently, but he could not recall when. He denied that Coffman and Amerson told him during their meetings in March 1976 on American Samoa that ECI was not required under its contract to undertake linear surveys and additional study plot work (Tr. 381-382). He could not recall whether they did or not (Tr. 430-431), but he testified (Tr. 431) that although he could not recall whether they did or not at the Mar. 19, 1976, meeting, he "believes" they did at some time tell him that the linear surveys and extra study plots were outside the scope of the contract.

[1] From the foregoing and other record evidence,⁹ we find that Mr. Marvich, as the COR, was thoroughly familiar with the contract documents, including the Refined Field Methods (RFM) which he had approved; that he was aware of the additional work beyond the scope outlined in the RFM which ECI agreed to undertake and knew, or reasonably should have known, that ECI would not undertake the additional work and incur the additional expense thereof without seeking reimbursement from the Government. We also find that any knowledge of this potential claim acquired by Mr. Marvich was im-

F.N. 8—Cont'd.

data base. Such linear transects would facilitate more accurate extrapolation of distribution and abundance data collected at the site. As a result of this meeting with Ed and at his request, I agreed to the following:

"1. ECI would prepare a mid-project status report detailing progress to date and the direction of future work.

"2. This status report would be used to present the methodology for an enlarged field program. Specifically, while maintaining the present level of effort for data collection at study plots, a series of linear surveys would be conducted on each island at the maximum intensity that ECI's field staff could perform.

"I pointed out to Ed that both the report and linear surveys represented effort beyond the scope of either the contract or revised field methods. Following this meeting, Binion and I worked out an outline for the Mid-project Report. On Friday afternoon I boarded a plane for Hawaii."

⁹ The annual report itself (AP-33), in Figures 2 and 3 for the linear surveys, and on page 27 for the extra field work not including the linear surveys, sets forth planned extra work outside the original 13 study plots. And Monthly Progress Report Nos. 14-22, covering the period Apr. 25, 1976 through Dec. 24, 1976, submitted by ECI to Mr. Marvich describe the work of linear surveys and extra study plot work not required by the Refined Field Methods.

puted to the Contracting Officer. In sum, we are of the view that although ECI could have been more articulate in advising the Government of its potential claim for extra costs before undertaking the additional work arising out of the March 1976 meetings, sufficient notice was conveyed to the Government to satisfy the third element for a constructive change.

We hold therefore, that a constructive change took place in March 1976, entitling ECI, the appellant, to an equitable adjustment for unanticipated, extra costs incurred as a result thereof.¹⁰

Decision on Quantum

Having determined the issue of entitlement, we come now to the question of quantum. What extra costs were incurred by ECI as a result of the constructive change?

At the outset, we observe that ECI, by its letter of Jan. 4, 1978, claimed \$91,828 (AF-O). This figure represented ECI's calculation of total salaries expended since Mar. 20, 1977, the original contract completion date, plus overhead at the rate of 110 percent of the total salaries, plus 12 percent profit, less credit for unpurchased boat motors in the amount of \$1,692. ECI's Notice of Appeal (AF-S), dated Apr. 27, 1978, claimed the figure of

\$93,520 for extra work, obviously overlooking the credit for unpurchased boat motors. Its complaint, dated June 5, 1978, claimed again the figure of \$93,520 less a \$1,692 credit for unpurchased outboard motors. On June 5, 1978, without directly moving to amend its complaint on file with this Board, ECI addressed a letter to the Contracting Officer requesting an amendment to its claim of \$8,127.10 resulting in a total amended claim of \$99,955.10. The letter explained that the previous claim covered the period from Mar. 20, 1977, to Dec. 30, 1977, and that the amendment extended the claiming period to Jan. 15, 1978. The amendment was acknowledged by the Government in its Answer, dated July 20, 1978, and filed with the Board in response to ECI's complaint.

The evidence presented by ECI on the quantum issue consisted of appellant's Exhibit No. 47, the first page which is entitled, "Comparison of Budget Versus Actual Levels of Effort," and four more pages under the heading "Factual Assessment of Actual Level of Effort," and Dr. Coffman's testimony (Tr. 137-145). At Tr. 138, Dr. Coffman explained that he and several ECI bookkeepers prepared (AP-47) in an attempt to show specifically how dollars were spent on what ECI had contracted to do, and where the dollars were spent on "efforts outside the original contracted level of effort," and then to go through a series of cross-checks and analyses to authenticate that, indeed, these

¹⁰ The Armed Services Board of Contract Appeals has recently granted an equitable adjustment based upon an oral change order of a Government fire official who was neither the Contracting Officer nor the Contracting Officer's Representative. *Brown Construction Co., ASBCA No. 22648, Mar. 8, 1979, 79-1 BCA par. 13,745.*

June 29, 1979

numbers *could be* supported by actual records and work experience.

Among other things, the subject exhibit (AP-47) shows 393 man-days expended for 28 extra plots over and above the original 13. It also shows 173 man-days expended for the linear surveys and concludes that the total level of effort for extra contractual field work ordered by FWS equals 565 man-days. It also contains dollars and cents figures for budgeted items and claimed actual expenditures without any positive dollars and cents figures showing actual expenses directly resulting from the extra work caused by the Government. Dr. Coffman's testimony also lacks positive proof of the relationship of the extra contractual work effort and the dollars and cents expenditures therefor.

The Government audit report (Govt. Exh. X) verifies quite closely that ECI expended the total money claimed on the project, but does not support any dollars and cents figures which can be directly attributed to the constructive change.

[2] The Government, in its brief at page 13, correctly points out that ECI's evidence on quantum is but a variation of the total cost approach which this Board has previously disfavored in *Burns Const. Co.*, IBCA-1042-9-74 (Aug. 30, 1978), 85 I.D. 353, 78-2 BCA par. 13,405, where the Board stated:

The total cost approach is disfavored because it is based on three questionable

premises: (1) that the actual cost incurred is the proper cost, (2) that the original bid is a fair approximation of what it would have cost to perform the work had no change occurred, and (3) that the change was the sole cause of the increased costs.

The Government then points out that other factors could have caused cost increases for which the Government is not responsible,¹¹ and that therefore, the estimate of the claimed extra costs was suspect.

We concur in that appraisal, but add that ECI's cost figures are also suspect because of the rather extensive disparity between its minimum proposal of \$250,000 for which it originally estimated it could meet the contract objectives, and yet, when it learned that the FWS was limited by budget restrictions to \$200,000, it still represented that, the objective could be met for the lower price.

We are convinced that the evidence in this case supports a substantial equitable adjustment, but are not satisfied that all the claimed costs are attributable to the extra

¹¹ These other factors were cited at page 13 of the Government's brief as follows:

"ECI anticipated cooperation from the Government of American Samoa in providing transportation between the islands. (tr 200) This did not materialize and, this caused problems to ECI field personnel (tr 200). ECI had funding problems on the islands which 'seriously' hampered all field operations (ex. BB). The initial staffing plans were not met (ex. CC, 1st para.). One of the professional staff assigned could not do the field work (tr 257; ex. CC, 3rd para.). Personnel unexpectedly left the project (ex. DD). Staffing problems were a concern to the project leader Mr. Amerson (ex. FF). Some field work had to be redone (tr 271; ex. GG)."

contractual work. Thus, we believe the circumstances here dictate the need for and the reasonableness of the jury verdict approach. The Board finds that ECI incurred extra costs in excess of the contract price as a result of the constructive change and is entitled to an equi-

table adjustment in the sum of \$70,000.

DAVID DOANE,
Administrative Judge.

I CONCUR:

G. HERBERT PACKWOOD,
Administrative Judge.

STATE OF ALASKA ET AL.

41 IBLA 315

Decided July 11, 1979

Appeals from decisions of the Alaska State Office, Bureau of Land Management, holding Native allotment applications for approval and rejecting State selections.

Decisions set aside and cases remanded.

1. Administrative Procedure: Standing—State Selections

Where the State is a party to decisions by the Bureau of Land Management and the State's selection applications were rejected by those decisions, under 43 CFR 4.410, the State has standing to appeal those decisions to the Board of Land Appeals.

2. Alaska: Alaska Native Claims Settlement Act—Alaska: Land Grants and Selections: Generally—Alaska: Native Allotments—Alaska Native Claims Settlement Act: Aboriginal Claims—Indian Lands: Generally—State Selections

The Alaska Native Claims Settlement Act extinguished aboriginal occupancy claims of Alaska Natives; such claims cannot serve as a bar to a State selection, nor preclude the State from challenging Native allotment applications conflicting with its selection.

3. Administrative Procedure: Standing—Alaska: Alaska Native Claims Settlement Act—Alaska: Land Grants and Selections: Generally—Alaska: Native Allotments—Alaska Native

Claims Settlement Act: Aboriginal Claims—Indian Lands: Generally—Rules of Practice: Private Contests—State Selections

Under the "functional" standard to determine administrative standing set forth in *Koniag, Inc. v. Andrus*, 580 F. 2d 801 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.

4. Rules of Practice: Private Contests—Words and Phrases

"Person." A state is a "person" within the meaning of the Department's private contest regulations.

5. Administrative Procedure: Adjudication—Alaska: Land Grants and Selections: Generally—Alaska: Native Allotments

State of Alaska selection applications should not be rejected because of conflicts with Native allotment applications which are to be approved without first affording the State notice of such action to be taken and an opportunity to contest the conflicting claims if it desires.

APPEARANCES: Thomas E. Meachum, Esq., Assistant Attorney General, State of Alaska, Anchorage; Alaska, for appellants; Alaska Legal Services Corp., Anchorage; and Ketchikan, Alaska, for Native allotment applicants.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

The appeals which have been consolidated for this decision all involve State selection applications filed pursuant to the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 (1958), and Native allotment applications filed pursuant to the Act of May 17, 1906, 34 Stat. 192 as amended by the Act of Aug. 2, 1956, 70 Stat. 954, 43 U.S.C. §§ 270-1 to 270-3 (1970) (now repealed subject to pending applications, sec. 18(a), Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (1976)).¹ The cases are identified in Appendix A attached hereto. The State selections in the subject cases were all partially rejected because of conflicting Native allotment applications which the Alaska State Office, Bureau of Land Management (BLM), found valid.²

Alaska Legal Services Corp. (ALSC), representing some of the Native allotment applicants,³ filed

a motion to dismiss the State's appeals for lack of standing. ALSC asserts that the lands applied for by the State are subject to valid village selections under sec. 12(a)(1) of ANCSA, and that sec. 11(a)(2) of ANCSA withdraws for village selection, "lands * * * that have been selected by or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act * * *" ALSC Memorandum In Support of Motion for Dismissal of State's Appeal, p. 1. Therefore, ALSC argues, even if the Native allotment applications are rejected, the village corporations would acquire the land; thus, the State has no direct interest in the land and lacks standing to appeal. ALSC further argues that the State had a duty to ascertain if the lands selected were occupied by Natives and failure to do so does not prevent the State being charged with notice of such occupancy. ALSC asserts that the cases, *Donald Peters*, 26 IBLA 235, 83 I.D. 308 (1976), and *State of Alaska, John Nusunginya*, 28 IBLA 83 (1976), are distinguishable on their facts. It argues that initiation of a Government contest by BLM would unfairly place the burden of proof on the Native allotment applicants who have already been found to satisfy the requirements of the Native Allotment Act.

The State filed a statement of reasons which adopts the reasons for appeal submitted in the *Nusunginya* case, *supra*, and a statement of standing. The State filed these selection applications before any of the Native allotment applications

¹ These 11 cases were consolidated with 7 others by order of July 30, 1976, under the rubric Mary Klein Zimin, 76-639. On further consideration of the matter we have decided that there are differences in the issues in the cases which necessitate the issuance of separate opinions.

² The decisions below issued in 1976. Our consideration of these appeals has been delayed pending decisions by the United States Court of Appeals in *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), and *Pence v. Andrus*, 536 F.2d 733 (9th Cir. 1978).

³ Native allotment applicants in the following cases are represented by ALSC: 76-639, 76-640, 76-687, 76-689, 76-692, 76-715, and 76-777. No appearances were entered for the Native allotment applicants in the remaining cases here concerned.

were filed. Many of the State selections had been tentatively approved. Under 43 CFR 4.410, "any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right to appeal to the board." The State argues that the decisions of the Alaska State Office rejecting the State selections because of conflicting Native allotment applications are decisions adversely affecting the State and are appealable. The State asserts that the selection applications segregated the lands from appropriation and precluded subsequent filing by an adverse claimant. This establishes an equitable interest in the lands "which cannot be summarily erased by a discretionary decision to approve a Native allotment application."

In response to ALSC's argument that ANCSA withdrew these lands for village selection, the State has withdrawn it appeals concerning parcels of lands withdrawn for compulsory core township selection by Native villages. The State contends that some of the lands still subject to this appeal are not withdrawn by secs. 11 and 12 of ANCSA, and some of the lands were selected under the Mental Health Enabling Act, 70 Stat. 709, 711, and are not subject to the withdrawals in secs. 11 and 12 of ANCSA. As to those lands which are subject to the withdrawal, the State points out that the villages are not required to select the lands, that they have selected thousands of acres more than they are entitled

to receive, and, therefore, it is not certain that the lands will not be available for conveyance to the State. The State thus asserts it has a sufficient interest in the lands to support its appeal.

Substantially, the State argues that its applications segregated the land from any subsequent appropriation. It has urged, as summarized in *Nusunginya*, *supra* at 85:

* * * Moreover, because the allotment to a Native is within the discretion of the Secretary, the allotment cannot be the kind of "valid existing right" preserved by section 6(a) of the Statehood Act. The State urges that this Board overrule two of its earlier decisions which upheld the right of Natives to make application subsequent to the filing of a state selection application, where use and occupancy preceded the state selection: *Archie Wheeler*, 1 IBLA 139 (1970); *Lucy Ahvakana*, 3 IBLA 341 (1971). Third, the State argues that section 4(c) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1603(c) (Supp. IV, 1974), was a congressional confirmation of all previous tentative approvals which cannot be revoked by administrative decisions. Fourth, the State argues that the fact that a Native qualifies for an allotment does not necessarily remove the land from the category of "vacant, unappropriated, and unreserved." Finally, it should be noted that the State takes umbrage at not being informed of the Native's application until the decision rejecting its selection application. It contends that this omission denies it any opportunity to present an informed and effective protest and present its position.

The State asserts that BLM's rejection of the selections without notice and an opportunity to be heard violates due process and requests that the Government initiate

contest proceedings in which the State is allowed to intervene against the Native allotment applicants, or alternatively that it be allowed to contest the conflicting applications.

[1] Regulation 43 CFR 4.410, quoted above, gives a right of appeal to this Board to any party adversely affected by a BLM decision. The State is a party to the decisions below, and the State's selection applications were rejected by those decisions. These facts bring the State squarely within the language of the regulation which grants it standing to appeal.

The determinative issue involved in these appeals concerns the propriety of rejecting the State selection applications while approving the Native allotment applications without first affording the State notice of the conflicts, that BLM would approve the conflicting applications and reject the State's applications, and without affording the State the opportunity to contest the conflicting applications.

[2] ALSC argues that the State has no standing to challenge the allotment applications because lands occupied by Natives do not fall within the ambit of the provision of the Alaska Statehood Act allowing the State to select "public lands of the United States which are vacant, unappropriated and unreserved." A difficulty with this argument is that it is based upon a factual premise which the State is challenging, namely, the occupancy of the Natives under the Allotment Act. The State's position is that if the use and occupancy of the in-

dividual Natives are not sufficient to warrant allowance of their allotment applications and the land is otherwise available, it is subject to their selection applications. Implicit in its contentions are issues concerning the type, extent, and adequacy of the Natives' use and occupancy.

A case cited to support ALSC's contentions concerning the effect of Native occupancy is *State of Alaska v. Udall*, 420 F. 2d 938, 940 (9th Cir. 1969), wherein the court refused to rule as a matter of law "that under no circumstances could Indian trapping, hunting and camping * * * constitute a condition which would deprive the selected lands of the status of being 'vacant, unappropriated, and unreserved.'" There a Native village intervened as a party defendant in a suit by the State against the Secretary of the Interior. The Natives asserted that the village had possessory rights to lands sought by the State under selection applications. The Natives' alleged rights were based on present and aboriginal use and occupancy. The court held there were genuine issues of material fact requiring a trial. It refused to rule as a matter of law then on the aboriginal claims asserted by Natives and their affect upon the State. It specifically noted that pending legislation might resolve the question.

Thereafter, the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 (1976), was passed by Congress to resolve the Native aboriginal claims asserted for much of the area of the State of Alaska. Dis-

July 11, 1979

cussions of the circumstances, statutes, cases, and other matters leading to the passage of ANCSA are in recent court decisions concerning the effect of the Act. See, e.g., *Cape Fox Corp. v. United States*, 456 F. Supp. 784 (D. Alaska 1978); *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977); *Edwardsen v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973). From the rulings in the afore-cited cases, it appears that any Native claims based solely upon aboriginal occupancy can no longer serve as a bar to State selections, although State selections may ultimately be barred to specific lands granted to Native corporations or villages by provisions of ANCSA. Passage of ANCSA and these cases interpreting it have now superseded *State of Alaska v. Udall*, *supra*, and the implication raised there that aboriginal Native claims might bar State selections.

[3] The issue ALSC has raised concerning conflicts with Native village selections under ANCSA does not bar the State's standing here. Although under ANCSA final approval of village selections would require rejection of conflicting State selections, as the State has pointed out, the villages here have selected more acreage than allowed to them under ANCSA. Therefore, until there has been a final determination of the areas granted to the villages, the State retains its interest in the land by its selection application and the possibility that its interest may ultimately be defeated does not take away its present interest and stand-

ing. Any doubt about the State's standing to challenge Native claims conflicting with its selection rights has been resolved by the United States Court of Appeals for the District of Columbia Circuit in *Koniag, Inc. v. Andrus*, 580 F. 2d 601 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 733 (1979). In *Koniag* the State had not yet filed selection applications for land claimed by the villages. However, the mere possibility that it might later seek to select such land was held to be sufficient to confer standing on the State to challenge the eligibility of Native Alaskan villages under ANCSA pursuant to regulations of this Department applicable to the Alaska Native Claims Appeals Board. The State's position is stronger here than in *Koniag* as it has filed selection applications for the lands in conflict. It was noted in *Koniag* at 613-614 that there are conceptual differences between judicial and administrative standing; thus, a party might not have standing to obtain judicial review but could have administrative standing. The court then stated:

The fact that judicial and administrative standing are conceptually distinct does not, of course, mean that Congress could not require an administrative agency to apply judicial standing concepts in determining administrative standing. Nor does it mean that courts and agencies should never refer to judicial standing decisions, where helpful, by way of analogy. But absent a specific justification for invoking judicial standing decisions, I see no basis for interjecting the complex and restrictive law

of judicial standing into the administrative process.

Id. To determine administrative standing, the court suggested that the language of the statutes and the agency regulations should be the starting point. Where the language is general, such as speaking of persons "aggrieved," "affected," or having an "interest," there may be need for a functional approach to determine the issue. After analyzing court authorities, the court, at 616, concludes:

These authorities suggest a functional analysis composed of the following factors:

(1) The nature of the interest asserted by the potential participant.

(2) The relevance of this interest to the goals and purposes of the agency.

(3) The qualifications of the potential participant to represent this interest.

(4) Whether other persons could be expected to represent adequately this interest.

(5) Whether special considerations indicate that an award of standing would not be in the public interest.

Such a standard would have to be flexible, of course, and the appropriate variables might well vary from one context to another.¹³ The important point is that administrative standing should be tailored to the functions of the agency, not to arcane doctrine from another area of the law.

¹³ One important distinction might be between a would-be participant seeking to institute a new administrative hearing or appeal, and one merely seeking to intervene in an on-going proceeding. An award of standing in the former circumstances is clearly more burdensome than in the latter. See 3 K. Davis, *Administrative Law Treatise* 241 (1958). Since intervention generally has no effect on what decisions are reached, or when they are

rendered, it might be appropriate in considering requests for intervention merely to focus on (1) whether the potential intervenor represents a point of view that would assist in illuminating the issues; (2) whether he is qualified to represent this point of view; (3) whether other parties to the proceeding could be expected to represent this perspective; and (4) whether there are special considerations that indicate intervention would not be in the public interest.

The court then applied this "functional" standard and found that the State was properly held to have standing to appeal the Native village eligibility determinations. We have previously ruled that the State had standing to appeal because it had an application which was rejected, and, thus, was adversely affected by the decision. The State's selection applications also give it an interest in the land sufficient to meet the requirements of the private contest regulation, 43 CFR 4.450-1, which provides in part:

Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land * * * may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

Where the State desires to present evidence concerning the sufficiency of a Native's use and occupancy, this would be information outside the records of BLM. Under the functional approach, this would be helpful to the agency. We rec-

ognize the special obligation and interest of the Secretary of the Interior with regard to Indians and Natives in Alaska; however, he also has a statutory duty to assure that there has been compliance with the public land laws, including the Alaska Native Allotment Act and the Alaska Statehood Act, before land is conveyed pursuant to such laws. As a mere stakeholder here, this Department must be concerned with fairness to all parties. Therefore, we cannot accept the argument by ALSC that because of Interior's special duty to Natives, the State should not be allowed to challenge the Native allotments. We must conclude that under the standard enunciated in *Koniag* the State has standing here, and also under the contest regulation quoted above. We have specifically held that the State has standing to bring a private contest against Native allotment applications conflicting with a State airport where the State had a selection application and an airport lease application and contended that the airport extension was needed for local community and public interest needs. *State of Alaska*, 40 IBLA 79 (1979). See also, *State of Alaska*, 40 IBLA 118 (1979).

[4] In *State of Alaska*, 40 IBLA 79 (1979), and many other cases, the Department has consistently recognized that states are included within the term "person" in the contest regulation. See e.g., *Navajo Tribe of Indians v. State of Utah*, 12 IBLA 1, 80 I.D. 441, 501 (1973);

State of California v. Doria Mining and Engineering Corp., 17 IBLA 380 (1974), *aff'd*, *Doria Mining and Engineering Corp. v. Morton*, 420 F. Supp. 837 (C.D. Cal. 1976); *State of California v. Rodeffer*, 75 I.D. 176 (1968); *State of Louisiana v. State Exploration Co.*, 73 I.D. 148 (1966).

In a private contest, as well as a Governmental contest, the Native must be given adequate notice and an opportunity for an oral hearing. In *Donald Peters*, 26 IBLA 235, 83 I.D. 308 (1976), *reaffirmed*, 28 IBLA 153, 83 I.D. 564 (1976), we held that the Departmental contest procedures would be applied when there is an issue of fact to be resolved in adjudicating Native allotment applications. In *Pence v. Andrus*, 586 F. 2d 733 (9th Cir. 1978), the Court of Appeals held that these procedures comply, at least facially, with the due process requirements set out in *Pence v. Kleppe*, 529 F. 2d 135 (9th Cir. 1976). That case ruled that Native allotment applicants had a sufficient property interest in their allotment applications so as to be entitled under due process to adequate notice and an opportunity for an oral hearing before their applications can be rejected because of insufficient use and occupancy.

Under the Alaska Native Allotment Act there must be "substantial use and occupancy" by a Native. As mentioned before, *State of Alaska v. Udall*, *supra*, left to a fact-finding trial a determination whether Native aboriginal claims

based on trapping, hunting, and camping could bar a State selection. However, aboriginal claims have now been abolished and that case has, in effect, been superseded by cases decided since ANCSA. We need not decide, in the present posture of this case, issues pertaining to the type of use and occupancy by a Native in his/her individual capacity seeking title under the Alaska Native Allotment Act which would be sufficient to bar the State, except to say that, at a very minimum, the use and occupancy would have to be sufficient to meet the statutory and regulatory requirements for allowance of an allotment if there were no conflicting claim.⁴ We shall await future action and briefing by the parties before deciding whether there may be a more strict standard of use and occupancy, or at least, a more strict burden of proof necessary where there are third-party claims conflicting with an allotment application than where only the United States is involved and the Secretary is exercising his discretionary authority in making an allotment.

From the above, it is clear that the State has standing to contest a Native allotment application conflicting with its selection application regardless of whether the land is also within a Native village selection area. It also has standing to appeal an adverse decision affecting

its selection application because of a conflict.

[5] Here, however, the State was not afforded an opportunity to contest the claims before its application was rejected. The action by BLM, therefore, afforded the State no choice but to appeal from the adverse decisions. This was not proper procedure in these circumstances. For this reason, we shall set aside the decisions to afford the State its opportunity to contest the conflicting claims if it desires.

The State's argument that the United States must contest all Native allotment claims where there is a conflicting State selection cannot be accepted. Only if BLM, or this Board on review, determines that there is a question as to a Native's compliance with the Act so as to warrant the initiation of a Government contest or a need for a hearing on facts prior to an exercise of discretion need such action be taken. Because the issues raised in these appeals primarily concern the procedural rights of the State, we are not ruling on merits of the Native allotment applications. When these case records are returned to BLM, it shall give notice of their return to the State and afford it time within which to bring private contest proceedings against the Natives' conflicting claims. If the State fails to do so within the time required, BLM may then reject the State selection applications. The State may then appeal to this Board for a review of the case on its merits pursuant to subpart 43 CFR 4.400. This review, however, will be limited to deciding

⁴ For examples of Indian or Native occupancy and third party claims, compare *Cramer v. United States*, 261 U.S. 219 (1923), with *Herbert H. Hilscher*, 67 I.D. 410 (1960). Also see *Navajo Tribe of Indians v. State of Utah*, *supra*.

whether the application was properly rejected because the Native allotment application is properly allowed, or whether there is doubt as to the adequacy of the allotment application so as to warrant a contest by the United States. *See State of Alaska*, 41 IBLA 309 (1979).

Notice of future proceedings should be given to the Native villages and any other conflicting parties.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases remanded for further proceedings consistent with this opinion.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

NEWTON FRISHBERG,
Chief Administrative Judge.

APPENDIX A

IBLA No.	Native Allotment No. and Name		Conflicting State Selection No.
*76-639	Mary K. Zimin	AA-6157	A-053268
76-640	Marsha Thorson	AA-7208	A-054308
76-641	Nicoli Tunglung	AA-7785	A-054358
			A-054590
76-687	Wassillie Ilutsik	AA-7292	A-054310
			A-054373
76-689	Bernice Brown	AA-7324	A-052985
76-690	Rose Wheeler	AA-067589	A-058734
76-691	Natalie Odegaard	AA-067640	A-053268
*76-692	Phyllis Westcoast	AA-7307	A-054332
76-715	Erma Lawrence	AA-6553	AA-208
76-716	John Estabrook	AA-6973	AA-4805
76-777	Vera Tschaepf	AA-6614	A-050580

* The State has withdrawn its appeals in part as to parcels within the Native village compulsory core townships.

JAMES MOORE

1 IBSMA 216

Decided July 20, 1979

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM) from a Jan. 16, 1979, decision of Administrative Law Judge David Torbett vacating a notice of violation and two orders of cessation issued by OSM under the authority of sec. 521 of the

Surface Mining Control and Reclamation Act of 1977.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

In a case on appeal, the Board bases its deliberations on the record before it.

2. Surface Mining Control and Reclamation Act of 1977: Initial Regula-

tory Program: Performance Requirements: Applicability

The extraction of coal as an incidental part of privately financed construction is not an activity excluded, as such, from coverage by the performance requirements of the initial regulatory program.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

Where the applicant for review bases his defense upon the assertion that the amount of coal removed or to be removed is less than that provided by law to constitute surface coal mining, he must prove such an assertion.

APPEARANCES: John Philip Williams, Esq., Office of the Field Solicitor (Knoxville), Michael J. Kurman, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor, Office of the Solicitor, for the Office of Surface Mining Reclamation and Enforcement, and Warren N. Scoville, Esq., Lewis and Scoville, London, Kentucky, for James Moore.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

On July 12, 1978, representatives of the Office of Surface Mining Reclamation and Enforcement (OSM) issued to James Moore (Moore) an order of cessation, for mining without a state permit, under the Surface Mining Control and Reclama-

tion Act of 1977 (Act),¹ as well as a notice of violation alleging four separate violations of the Act. On July 20, 1978, Moore applied for review of these enforcement actions. The inspectors returned to the site on July 26, 1978, for the purpose of attending a minesite review hearing requested by Moore. At that time, based on their observations of remedial work done by Moore in the interim, the inspectors terminated the notice for two of the alleged violations but issued a cessation order for the other two because Moore had failed to abate those violations.

At the hearing on Moore's application for review, held on Sept. 21, 1978, it became clear that Moore did not and would not otherwise contest the procedural and substantive validity of the issuance of the notices and orders if it could be legally concluded that Moore and his operation were covered by the Act. Moore contended that, since the major purpose of his operation was the building of a racetrack to which the extraction of coal was incidental, he was not surface mining and therefore was not subject to the Act. Thus, the Administrative Law Judge (ALJ) conducted the hearing solely on the issue of the Act's applicability and not on the substantive validity of the alleged violations. Throughout the hearing and in its post-hearing brief, OSM contended principally that Moore and his operation are subject to the

¹ 30 U.S.C.A. §§ 1201-1328 (West Supp. 1979); P.L. 95-87, 91 Stat. 445 (1977).

Act because Moore had conducted "surface coal mining operations" as that term is defined in the Act and because Moore had extracted more than 250 tons of coal per year for commercial use.

On Jan. 16, 1979, the ALJ issued a decision in which he concluded that Moore was not subject to the Act. The basis for that conclusion was his determination that Moore was neither an operator nor a permittee for purposes of the Act. Concentrating almost exclusively on the former description, the ALJ held that OSM failed to prove that Moore removed or intended to remove from his property more than 250 tons of coal in a year and that, therefore, OSM had failed to prove that Moore was an operator.

OSM appealed the ALJ's decision on Feb. 16, 1979, and filed a detailed and lengthy brief on Mar. 19, 1979. After requesting and receiving an extension of time for the filing of a brief, Moore filed with the Board, on Apr. 30, 1979, a copy of the decision of the ALJ along with a copy of a Memorandum of Law that had also been previously filed with the ALJ.

On Apr. 24, 1979, the Board had issued its decision in *Dennis R. Patrick*, 1 IBSMA 158, 86 I.D. 266 (1979), in which the Board dealt with issues similar to the issues in this case. The parties requested and were granted leave to submit additional briefs addressed to the implications of *Patrick*. OSM chose to do so.

Discussion

[1, 2] In *Patrick*, the Board held that the initial Federal regulatory program is not applicable to a surface coal mining operation which is located on state land and which is not subject to state regulation within the scope of any of the initial performance standards. On the basis of the record presented to the Board in *Patrick*, it determined that Patrick's privately funded construction project was located on land within the jurisdiction of the Commonwealth of Kentucky, but that his project was not subject to regulation by the Commonwealth within the scope of any of the initial Federal performance standards. Were the record in this case the same, as to Kentucky law governing coal extraction incidental to a privately funded construction project, the Board would be governed by *Patrick* and hold accordingly. On the basis of the record before it in this appeal, however, the Board must conclude that under Kentucky law, just as under the Federal interim regulations, privately funded construction projects are not, as such, excluded from coverage of the performance requirements pertinent to surface coal mining operations.² It follows

² A regulation of the Kentucky Department for Natural Resources and Environmental Protection, cited by Moore in his hearing memorandum and by OSM in its answer to the Application for Review (although in its supplemental brief to this Board OSM states that Kentucky has not promulgated any pertinent regulations), provides that the requirements of Kentucky's strip mining statute, KRS Chapter 350, shall not apply to the

Continued

that the letter of Sept. 21, 1978, whereby Moore was informed by the Division of Permits (Kentucky Department for Natural Resources and Environmental Protection) that a state mining permit would not be required for his construction project, does not insulate Moore from regulation by OSM because that letter may not be viewed as an expression of the state authority's lack of power to regulate Moore's operation under existing Kentucky law.³

Continued

"extraction of coal as an incidental part of highway or other construction financed by federal, state or local government." 405 KAR 1:020E § 1(2) (May 3, 1978). This provision does not exclude from the coverage of Kentucky's coal mining regulations privately financed construction such as that conducted by Moore. The "policy" statement to the contrary (Policy Memorandum 78-0004 of the Secretary of Kentucky's Department for Natural Resources and Environmental Protection, Aug. 28, 1978), which was given considerable weight in *Patrick*, must be ignored in view of this regulatory provision and the mandate of 405 KAR 1:020E § 2 (May 3, 1978) that the regulations of 405 KAR Chapter 1 are "to be construed as compatible with federal regulations adopted pursuant to Public Law 95-87, the 'Surface Mining Control and Reclamation Act of 1977.'"

The Federal counterpart of 405 KAR 1:020E § 1(2) is 30 CFR 700.11(c), which implements 30 U.S.C.A. § 1278(3) (West Supp. 1979). Although the language of 30 CFR 700.11(c) is not discussed in the Preamble to the interim regulations, the legislative history of 30 U.S.C.A. § 1278(3) makes clear that only publicly financed construction projects are exempt from the coverage of the Federal surface coal mining performance standards. See H.R. Rep. No. 95-493, 95th Cong., 1st Sess. 112 (1977).

³ That a state does not *in fact* regulate a particular surface coal mining operation (as defined by Federal law) does not prevent OSM from doing so under the authority of the interim regulations. During the initial regula-

The ALJ held that Moore was not subject to the requirements of the interim regulations because he was not an "operator."⁴ Under the interim regulations, however, persons are generally subjected to the law because they are "permittees." As we held in *Delight Coal Corp.*, 1 IBSMA 186, 86 I.D. 321 (1979), a permittee, during the interim regulatory period, is one who conducts surface coal mining operations that are regulated by a state under state law whether or not he has applied for or been issued a formal certificate to that effect.⁵ To be subject to regulation under Kentucky law, Moore must be, *inter alia*, an "operator" as that term is used in state law. Under Kentucky law, an "operator" is defined as one "who removes or intends to remove more than two hundred fifty (250) tons

tory program, the critical determinant of OSM's jurisdiction over a surface coal mining operation conducted on state land is whether the operation is *subject* to state regulation within the scope of any of the initial Federal performance standards.

⁴ In the Federal interim regulations, an "operator" is defined as one "engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth by mining within 12 consecutive calendar months in any one location." 30 CFR 700.5. The term "operator," though, is only sparingly utilized in the regulations after it is defined. For example, it is part of the title in 30 CFR 710.12 ("Special exemption for small operators."), and it appears later in 30 CFR 723.12(d)(3), concerning assessment procedures for civil penalties ("In calculating points to be assigned for negligence, the actions of all persons working on the mine site shall be attributed to the permittee or operator.").

⁵ There is no minimum tonnage requirement in the interim regulations insofar as the definition of a "permittee" is concerned. 30 CFR 700.5.

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of coal within twelve (12) successive calendar months * * *." KRS 350.010(6); 405 KAR 1:010E § 1 (34).⁶ If Moore did not remove or intend to remove more than 250 tons of coal in a 12-month period, then, under Kentucky law, he would not be subject to State regulation within the scope of the initial Federal performance standards and, thus, not subject to OSM's jurisdiction.

The ALJ seems to have determined that OSM failed to carry its burden in establishing a removal of or intent to remove more than 250 tons of coal by Moore. If the burden were on OSM so to demonstrate, there is adequate support in the record for the ALJ to have found the way he did. Although OSM offered testimony to the effect that many times 250 tons of coal were saved, the ALJ was rightly entitled to reject that testimony and some of the inferences on which it was based and to confine himself to the 100-120 tons of stockpiled coal that was conceded by Moore. This conclusion, however, is warranted only if the burden were in fact on OSM to

establish the removal. The Board does not believe it was.⁷

[3] When OSM issued its notice of violation, it, in effect, charged Moore with being a permittee who had violated certain provisions of the interim regulations. Charging that someone is a permittee, in Kentucky, includes an allegation that the person has removed or intends to remove over 250 tons of coal in a 12-month period. If undisputed, this allegation is deemed admitted. If it is disputed, though, it is up to the alleged permittee to establish that he did not remove or intend to remove the requisite amount of coal.⁸ To hold otherwise would make the efficient administration of the Act more difficult. The permittee is the one with ready access to the records to show how many tons were removed or sold within any period. In this case, Moore testified he kept

⁷ The procedural regulations provide that in proceedings to review notices of violation and orders of cessation OSM has the burden of establishing a prima facie case but that the ultimate burden of persuasion rests with the applicant for review. 43 CFR 4.1171. A prima facie case is made where sufficient evidence is presented to establish the essential facts and which evidence will remain sufficient if not contradicted. It is evidence that will justify but not compel a finding in favor of the one presenting it. OSM made such a presentation.

⁶ Unlike the Federal law, the term "permittee" does not appear in the Kentucky strip mining statute. Instead, the critical status appears to be that of "operator," because all of the mandates of the Kentucky statute are directed to operators. See KRS Chap. 350 (May 3, 1978); see especially KRS 350.028(3) and KRS 350.060. In this regard we note, also, that the Kentucky Department of Natural Resources and Environmental Protection has adopted, in essence, the definition of "operator" as an applicability provision in the regulations issued to implement KRS Chap. 350. 405 KAR 1:020E § 1(3).

⁸ In his Statement of Facts and Memorandum of Law, which constituted his Application for Review, Moore nowhere indicated that he intended to raise, much less rely on, the fact that he had removed or intended to remove less than 250 tons of coal in a 12-month period. Instead, he based his defense on the immunity of private construction projects to the interim regulations. The Board has, based upon the record in this case, rejected that defense.

no records (Tr. 107). He also stated he did not know exactly how much coal he had sold (Tr. 110, 111). There was testimony that 1,800 tons to 2,600 tons could have been removed (Tr. 38, 85). As to intention, Moore testified that he intended to sell more coal as it was removed (Tr. 117). None of the testimony, provided it is the duty of the permittee/operator to show such, could justify a conclusion that 250 tons or less of coal had been removed or were intended to be removed during a period of operation not exceeding 12 consecutive months. And, as in an affirmative defense, the one making the defense must establish it by pleading as well as proving it. It may be that failure to plead can be waived. Proof, though, absent a concession by the other party, is essential.

In view of the foregoing, we find that Moore failed to carry his burden as to the amount of coal removed or intended to be removed.⁹ The judgment of the ALJ is therefore reversed.

MELVIN J. MIRKIN,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

JUNE OIL AND GAS, INC.
COOK OIL AND GAS, INC.

41 IBLA 394

Decided July 24, 1979

Appeal from a decision of the Colorado State Office, Bureau of Land Management, rejecting appellants' simultaneous oil and gas lease offers, C-26939 and C-27026.

Affirmed.

1. Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: Applications: Filing

Where offers for the same parcel of land are filed by two corporations in a simultaneous oil and gas lease drawing, and where the directors of the first corporation having authority to file offers and execute leases are directors of the second with the same authority and the surrounding circumstances suggest that the corporations are interrelated, the drawing is inherently unfair and the offers are properly rejected as a prohibited multiple filing. Collusion or intent to deceive the Department need not be shown.

APPEARANCES: Philip G. Dufford, Esq., Welborn, Dufford, Cook and Brown, Denver, Colorado, for both appellants; Lyle K. Rising, Esq., Office of the Denver Regional Solicitor, Department of the Interior, for the Government.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

⁹ See fn. 7, *supra*, discussing the burdens of proof set forth in 43 CFR 4.1171.

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INTERIOR BOARD OF LAND APPEALS

In June and July 1978, June Oil and Gas, Inc., and Cook Oil and Gas, Inc., submitted offers for the simultaneous oil and gas lease drawings held by the Colorado State Office, Bureau of Land Management (BLM). Specifically, both corporations submitted drawing entry cards for parcel No. CO-337 in the June drawing and for parcel No. CO-361 in the July drawing. June Oil and Gas, Inc., received first priority on parcel No. CO-337 and second priority on parcel No. CO-361. Cook Oil and Gas, Inc., received no priority on parcel No. CO-337 as its card was not drawn, but received first priority on parcel No. CO-361. After review of the qualifications file for each corporation, BLM concluded that the corporations were interrelated and thus had gained a greater probability of successfully obtaining a lease or an interest in a lease in the drawing when both submitted offers on the same parcels. Therefore BLM rejected the priority offers stating that a multiple filing in violation of 43 CFR 3112.5-2 had occurred and citing in support of the deci-

sion, *Schermerhorn Oil Corp.*, 72 I.D. 486 (1965). Both corporations have appealed that decision and the cases were consolidated for review.

The relevant portion of 43 CFR 3112.5-2 states:

When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or party acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to § 3110.1-6(b), all offers filed by either party will be rejected.

Review of the corporate qualifications files maintained by the Colorado State Office for each corporation indicates that June Cook owns 100 percent of June Oil and Gas, Inc., and is chairman of the board of directors. Michael C. B. Cook owns 100 percent of Cook Oil and Gas, Inc., and is also chairman of the board of that corporation. At the time that the lease offers which are the subject of this appeal were made, the officers of each corporation were as follows:

	<i>June Oil and Gas, Inc.</i>	<i>Cook Oil and Gas, Inc.</i>
President/Director	Michael C. B. Cook	June Cook
Secretary/Treasurer/Director	Adrianna van der Stok	Adrianna van der Stok
Vice President for Land Administration	Madeline A. Meyer	Kati P. Ward

All of these directors, including the chairmen of the boards, and officers were authorized to sign on behalf of their corporations with respect to oil and gas leasing matters.

The Articles of Incorporation for each company state identical purposes,¹ list the same incorporators, and designate initial registered offices with the same address. In fact, the Articles of Incorporation for each are identical except for the names of the initial directors and registered agent of each. The Articles of Incorporation were executed on the same day and filed with the State of Colorado on the same day. The two corporations continue to have the same address and, as noted in appellants' statement of reasons and brief, share business facilities and personnel for purposes of convenience.

Appellants argue that *Schermerhorn Oil Corp., supra*, is "irrelevant to the case at issue" because neither of the two corporations own stock in the other as did Schermerhorn and thus no unfair advantage was gained by both corporations having

filed. In addition, appellants assert that a multiple filing does not occur when the cards are filled out by the same person if they were signed by different persons. Appellants further claim that the sharing of common facilities for business purposes does not constitute a multiple filing unless some agreement exists that the participants will mutually benefit from each other's offer.²

We would agree with appellants' argument that *Schermerhorn Oil Corp., supra*, is distinguishable, though only in part, because the two corporations are independently owned. However, we do not agree that the *Schermerhorn* decision is irrelevant to the cases at issue. In that case, one corporation, Schermerhorn, held a 29 percent stock interest in a second, Kenwood. The Deputy Solicitor ruled that when both corporations filed a lease offer for the same parcel of land, Schermerhorn had 1¼ chances of success because of its ownership of Kenwood stock. Thus the drawing in which they participated was inherently unfair whether or not there had been collusion or intent to de-

¹ The third provision of both Articles of Incorporation reads in relevant part:

"(a) Purpose. The nature, object and purposes of the business to be transacted shall be as follows:

"(i) To acquire and obtain interests in oil and gas leases.

"(ii) To develop oil and gas leases.

"(iii) To acquire and engage in other businesses. To acquire (for cash or in exchange for its assets or securities or otherwise) operate, dispose of and otherwise deal and engage in any lawful business or activity for which corporations may be organized under the laws of Colorado."

² Appellants cite *D. E. Pack*, 30 IBLA 166, 84 I.D. 192 (1977), as support for this proposition. However, *Pack* does not involve the sharing of common facilities for business purposes but rather the use of a filing service by an oil and gas lease applicant. The Board held that where an applicant files a lease offer through a leasing service under an arrangement where the applicant uses the leasing service's address and avails himself of other services, but no enforcement agreement is entered into which would require the applicant, if successful, to transfer any interest in the lease to the leasing service, then the service is not a party in interest.

ceive the Department and the Schermerhorn lease offer was properly rejected. Appellants correctly argue that this is not the situation we have before us now.

However, in *Schermerhorn Oil Corp., supra*, rejection of the Kenwood offer was upheld as well because of the additional finding that all of the officers of Schermerhorn with authority to execute offers and leases were also officers of Kenwood with the same authority. Similar circumstances are present in the cases now at issue. Here June Cook, the sole stockholder and chairman of the board of June Oil and Gas, Inc., is a director and officer of Cook Oil and Gas, Inc. Similarly, Michael C. B. Cook, the sole stockholder and chairman of the board of Cook Oil and Gas, Inc., is a director and officer of June Oil and Gas, Inc. In addition, the two corporations have a common secretary-treasurer/director. The sole office held by different persons for each corporation is that of Vice President for Land Administration. As previously noted, all directors and officers of each corporation may execute oil and gas offers and leases on behalf of their corporations. Consequently, as in *Schermerhorn Oil Corp., supra*, director/officers common to both corporations may file lease offers for the same land on behalf of both corporations.

The directors of a corporation are its governing body. They generally

exercise all powers vested in the corporation and are responsible for the management of ordinary corporate affairs as well as the management, control, and use of corporate property. 19 C.J.S. *Corporations* § 742 (1940). In *Panra Corp.*, 27 IBLA 220 (1976), the Board quoted the following statement concerning the duties of corporate directors and officers from *Alvest, Inc. v. Superior Oil Corp.*, 398 P. 2d 213 (Alaska 1965):

A corporate officer or director stands in a fiduciary relationship to his corporation. Out of this relationship arises the duty of reasonably protecting the interests of the corporation. It is inconsistent with and a breach of such duty for an officer or director to take advantage of a business opportunity for his own personal profit when, applying ethical standards of what is fair and equitable in a particular situation, the opportunity should belong to the corporation. Where a business opportunity is one in which the corporation has a legitimate interest, the officer or director may not take the opportunity for himself. If he does, he will hold all resulting benefit and profit in his fiduciary capacity for the use and benefit of the corporation. [Citations omitted.]

398 P. 2d at 215. The Board has previously held that when a director or officer of a corporation individually files a lease offer for the same land as the corporation itself files, a prohibited multiple filing occurs because the individual filing constitutes the taking of a corporate business opportunity for personal profit.

Such action is a breach of the director's or officer's fiduciary duty to the corporation and thus the profit accruing to that individual must be held for the corporation's benefit. As a result, the corporation will have had two chances to obtain the oil and gas lease. *William R. Boehm* 36 IBLA 346 (1978); *William R. Boehm*, 34 IBLA 216 (1978); *Graybill Terminals Co.*, 33 IBLA 243 (1978); *Panra Corp.*, *supra*. See *McKay v. Wahlenmaier*, 226 F. 2d 35, 44-46 (D.C. Cir. 1955). We find this principle also applicable to the present cases as it defines the relationship between June Oil and Gas, Inc., and Cook Oil and Gas, Inc., and identifies the problem which occurs when both file lease offers. In most instances, directors with fiduciary obligations to two competing corporations cannot reasonably protect and promote identical interests in a single business opportunity for the two corporations at the same time. When a business opportunity, such as filing for an oil and gas lease, arises which is equally appropriate for either corporation, the directors cannot take the opportunity for one of the corporations without breaching their duty to the other unless the corporations are in fact not competing and the action is beneficial to both regardless in whose name the action is taken. Therefore, in most instances, if directors decide to file offers on behalf of both corporations, they also will breach their fiduciary duty to each because the

second filing lessens the chance of success of the first offeror as between two competing offerors. Such dual filings could only be justified if they were beneficial to both corporations; that is, if they increased each corporation's chance at successfully obtaining an interest in the sought-after lease.³

The drawing entry cards at issue in these cases were signed on behalf of each corporation by the one officer who is neither a director nor common to both corporations.⁴ We hold that this fact does not change the result in this instance given the

³ The seventh provision of the Articles of Incorporation of each corporation appears to broadly relieve the corporations of the effect of interested or of common directors or officers in any corporate transaction. It reads in part:

"SEVENTH: The following provisions are inserted for the management of the business and for the conduct of the affairs of the corporation, and the same are in furtherance of and not in limitation or exclusion of the powers conferred by law.

"No contract or other transaction of the corporation with any other persons, firms or corporation, or in which this corporation is interested, shall be affected or invalidated by (a) the fact that any one or more of the directors or officers of this corporation is interested in or is a director or officer of such other firm or corporation; * * *"

The Board submits that closely-held corporations cannot unilaterally act to relieve themselves of obligations under Federal oil and gas leasing laws. In this instance, it would be particularly self-serving, given the other common characteristics, for the corporations to attempt to claim on the basis of such a provision that the director's interests cannot be considered with respect to the multiple filings issue.

⁴ The fact that the cards were apparently filled out by the same person is significant as evidence of joint operations and awareness of the two corporations that both were filing on the same parcels of land.

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interlocking management responsibilities of the directors and the other common characteristics outlined at the beginning of this opinion. June Oil and Gas, Inc., and Cook Oil and Gas, Inc., are so interrelated by virtue of their common director/officers and these other factors that it is difficult to define where the interests of each of the corporations begin and where they end. We would note further that appellants also apparently view themselves as having the same interests since they are represented by the same counsel in this case and one brief was submitted on behalf of both corporations. Where all of the circumstances so strongly suggest such common interests as to have made the drawing inherently unfair, collusion or intent to deceive the Department need not be shown. BLM has properly rejected their offers as a prohibited multiple filing.

Appellants suggest that it would be a rule without a purpose to prohibit the conduct of two corporations where the sole owners of each of the corporations could have filed on exactly the same parcels in the same manner in their individual capacities as husband and wife.

Appellants are correct in their contention that a husband and wife may individually file for the same parcel of land in a simultaneous drawing without running afoul of

either the sole party in interest requirement or the multiple filing prohibition. *See generally, Solicitor's Opinion*, M-36416 (Feb. 27, 1957); *Solicitor's Opinion*, M-36418, 64 I.D. 51 (1957). This argument, however, is not apropos to appellants' situation.

June and Michael Cook, each the sole owner of one of the corporations, are not citizens of the United States, but of the Netherlands (June) and Great Britain (Michael). Under the statute and regulations, aliens may not acquire or hold any direct or indirect interest in leases, except through ownership or control of stock in corporations holding oil and gas leases, provided that the laws of the alien's country do not deny similar privileges to citizens of the United States. *See* 30 U.S.C. § 181 (1976); 43 CFR 3102.2-1(a). Thus, in actual fact, neither June Cook nor Michael Cook could have filed for an oil and gas lease in their own name. It is only through the ownership of stock in a corporation that either can hold any interest in an oil and gas lease.

Moreover, the rule prohibiting multiple filings would be without substantial efficacy if two corporations as closely identified as June Oil and Gas, Inc., and Cook Oil and Gas, Inc., were allowed to file mutually beneficial lease offers simply because they were controlled by husband and wife. The issue in this case is not the marriage relation-

ship of the controlling shareholders; rather, it is the nature of the two corporations themselves. Having availed themselves of the benefits attendant to the corporate structure, the owners cannot simultaneously request that their actions be treated as if no corporation actually existed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JAMES L. BURSKI,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

JOAN B. THOMPSON,
Administrative Judge.

July 31, 1979

APPEAL OF STATE OF ALASKA**3 ANCAB 297**

Decided July 31, 1979

Appeal of State of Alaska from decision of the Bureau of Land Management F-14909-A.

Affirmed in part, reversed in part and remanded.

1. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

The Board is bound by Secretarial policy and interpretation of law expressed in a Solicitor's Opinion in which the Secretary of the Interior concurred.

2. Withdrawals and Reservations: Generally—Submerged Lands Act: Generally

The Board adopts the Solicitor's conclusion that Public Land Order No. 82 (Jan. 22, 1943) (8 FR 1599 (Feb. 4, 1943)) constituted an express retention for the United States of submerged lands when Alaska was admitted to the Union, and title to the submerged lands withdrawn by PLO 82 did not pass to the State of Alaska with statehood.

3. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Submerged Lands Act: Generally

Regulations in 43 CFR 2650.5-1(b) deal explicitly with chargeability of acreage and implicitly with land title, establishing two categories of submerged lands not required to be selected and charged: those underlying navigable waters, and those

underlying nonnavigable waters of one-half section or more.

4. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Submerged Lands Act: Generally

Under regulations in 43 CFR 2650.5-1(b), Federal ownership of submerged lands does not require all such lands to be charged against a Native corporation's acreage entitlement.

5. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

The Secretary, and this Board, are bound by duly promulgated regulations of the Department.

6. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

As between a published regulation applicable to chargeability of submerged land and an unpublished Departmental decision paper applicable to the same issue, the Board is bound to follow the regulation. Therefore, regardless of whether the United States retains ownership of the bed of the Colville River, the Bureau of Land Management must, pursuant to 43 CFR 2650.5-1(b), determine whether the river is navigable and, if it is found navigable, must exclude the riverbed from the acreage to be charged against Kuugpik's entitlement.

APPEARANCES: James Reeves, Esq., and G. Thomas Koester, Esq., Department of Law, on behalf of the State of Alaska; Francis Neville, Esq., Office

of the Regional Solicitor, on behalf of the Bureau of Land Management; James Wickwire, Esq., and David Crosby, Esq., on behalf of Kuugpik Corporation.

*OPINION BY
ALASKA NATIVE CLAIMS
APPEAL BOARD*

SUMMARY OF APPEAL

The State of Alaska appeals conveyance of land underlying inland waters, the Nechelik Channel of the Colville River, to Kuugpik Corp., on the grounds that the Colville River is navigable and the bed of the stream therefore belongs to the State. Issues raised are: (1) the effect of a Public Land Order (PLO) No. 82 (Jan. 22, 1943) (8 FR 1599 (Feb. 4, 1943)) which withdrew land for military purposes on the ownership of the bed of the Colville River; and (2) whether regulations in 43 CFR 2650.5-1, dealing with chargeability against acreage entitlements of land under navigable and nonnavigable waters, apply to submerged lands withdrawn by PLO 82, which remain in Federal ownership.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 & Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J,

hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, the State Director or his delegate is the officer of the Bureau of Land Management, United States Department of the Interior, who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

FACTUAL BACKGROUND

In January of 1943, during World War II PLO 82 (8 FR 1599 (Feb. 4, 1953)) withdrew certain lands in northern Alaska, and the minerals in such lands, for use in connection with the war.

The Submerged Lands Act of 1953 (67 Stat. 29, 43 U.S.C. §§ 1301-1315 (1976)) granted title to certain underwater lands, both inland and off the marine coast, to the states.

The Alaska Statehood Act of 1958 (72 Stat. 339, 48 U.S.C. note preceding § 21) applied the Submerged Lands Act to Alaska, which was admitted to the Union on Jan. 3, 1959. (Proclamation No. 3269 (Jan. 3, 1959) 24 FR 81, 73 Stat. c 16.)

PLO 82 was in effect at the time of Statehood and remained in effect until it was revoked in 1960.

The Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), withdrew certain public lands in Alaska for selection by, and conveyance to, Native corporations formed under the Act.

Section 3(e) of ANCSA defines public lands as "all Federal lands and interests therein."

The present appeal arose pursuant to ANCSA when Kuugpik Corp. (Village of Nooiksut) selected lands within the area formerly covered by PLO 82.

The selection application specifically excluded lands underlying the Nechelik Channel of the Colville River, on the basis that the river was navigable and title to the river bed was in the State. BLM, in the decision here appealed, found it unnecessary to exclude the lands or to determine the navigability of the river, based on PLO 82. The decision stated:

No determination of navigability or tidal influence affecting the inland water bodies within the lands herein described is necessary as the lands were withdrawn by Public Land Order No. 82 (43 FR 1796, February 3, 1943) when the Alaska Statehood Act of July 7, 1958 was passed (see 72 Stat. 339, 343; 48 U.S.C. Ch. 2, sec. 6(m) (1970)); therefore, the lands beneath tidal or navigable water bodies did not vest in the State pursuant to the Submerged Lands Act of May 22, 1953 (67 Stat. 29, 32, section 5; 43 U.S.C. Ch. 29, 1313(a) (1970)).

The State appealed, on the grounds that the Colville River is navigable, and that the State of Alaska, under the Submerged Lands Act, holds title to the beds of all navigable streams within its boundaries.

After filing of this appeal, the Board was notified by Kuugpik Corp. and the Bureau of Land Management that the Secretary of the

Interior was preparing to issue a decision on the effect of PLO 82 on title to submerged lands in Alaska. The Board therefore extended briefing schedules and on Oct. 18, 1978, suspended briefing pending the Secretarial decision on PLO 82.

The decision was rendered by Secretarial concurrence with an opinion, designated M-36911, prepared by the Solicitor of the Department of the Interior. (*The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska, Solicitor's Opinion*, 86 I.D. 151 (1978)). [Hereinafter cited as *Solicitor's Opinion M-36911*.]

This opinion concluded that coastal submerged lands were not withdrawn by PLO 82, but that inland submerged lands were withdrawn and, therefore, title to inland submerged lands did not pass to the State of Alaska upon admission to the Union.

Upon inquiry by the Board, the Secretary of the Interior notified the Board by letter dated Feb. 23, 1979:

Re: Appeal of State of Alaska from Decision of Bureau of Land Management F-14909-A (Kuugpik Corporation), ANCAB Decision VLS 78-32

On December 12, 1978, the Solicitor rendered an opinion on 'The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska' in which I concurred. My concurrence on this matter established Departmental policy and our legal position on the issues addressed in that memorandum. Accordingly, I direct you to apply that opinion in the referenced case

as well as in any other cases posing the same policy and legal issues.

With regard to other pending factual and legal issues, your Board should conduct appropriate proceedings and render a decision.

The Board notified the parties of the Secretary's response and reopened briefing.

Kuugpik Corp. then filed a brief, arguing that regardless of whether the United States retains ownership of the beds of these inland navigable waters, the decision of the Bureau of Land Management in this case must be reversed because 43 CFR 2650.5-1(b) requires BLM to exclude the beds of all navigable bodies of water from the acreage to be charged against Native entitlements.

Thus, this appeal presents two basic issues. The first, raised at the outset by the State, is: Does the State of Alaska own inland submerged lands under navigable waters, within the area withdrawn by PLO 82?

The second issue, raised by Kuugpik after issuance of *Solicitor's Opinion*, M-36911 on PLO 82, is: Do regulations in 43 CFR 2650.5-1(b) require BLM to exclude the beds of all navigable waters within a Native corporation's selection when title to the submerged bed is retained in Federal ownership?

The first issue deals with land ownership, while the second deals with chargeability of acreage. The first issue is resolved by *Solicitor's Opinion*, M-36911; the second is not. For reasons to be discussed herein, the Board finds that: (1) the State does not own inland sub-

merged lands under navigable waters within the area withdrawn by PLO 82; and (2) the acreage of such lands, retained in Federal ownership because of PLO 82, cannot be included in a Native corporation's selection or charged against their acreage entitlement unless the waters above such lands are determined to be nonnavigable pursuant to regulations in 43 CFR 2650.5-1(b).

OWNERSHIP OF SUBMERGED LANDS

The State claims title to inland submerged lands under navigable waters, within the area withdrawn by PLO 82. BLM concluded that PLO 82 prevented title to the bed of the Colville River from vesting in the State, regardless of the navigability of the river, and so made no finding on navigability.

The State denies the applicability of PLO 82 to inland submerged lands under navigable waters. The State argues that PLO 82 affects "public lands" and lands under navigable waters are not public lands; that PLO 82 withdrew lands from the operation of public land laws, but that the Statehood Act was not a public land law; and that PLO 82 was in support of the war effort and lapsed at the end of World War II.

The State contends that the Statehood Act and the Submerged Lands Act, granting the State title to lands under navigable waters, supersede a public land order; if this were not so, the National Defense withdrawal north of the Porcupine-Yukon-

Kuskokwim line, contained in the Statehood Act, would be unnecessary.

The State argues that § 11(b) of the Statehood Act maintained Federal legislative jurisdiction over military withdrawals, but did not affect title to the withdrawn lands. Alternatively, title vested in the State immediately upon revocation of PLO 82 in 1960, because the State received title under the equal footing doctrine in lands under navigable waters held in trust for the future State; because the Act of May 14, 1898 (30 Stat. 409, 43 U.S.C. § 942-1 (1976)), expressly reserved the beds of navigable waters for the State of Alaska; and because § 11 (b) of the Statehood Act left exclusive legislative jurisdiction over military lands in the United States only so long as the lands were used for military purposes.

The Solicitor, in *Opinion M-36911*, reaches a different result. He discusses whether references in PLO 82 to the public lands of Alaska could include coastal and inland submerged lands. The Solicitor states:

*** it is apparent that the question of whether the public lands in Alaska could include inland or coastal submerged lands has continued to turn on the language and purpose of the specific withdrawal at issue ***.

[*Solicitor's Opinion*, M-36911, 86 I.D. 151 at 159.]

After finding that coastal submerged lands were excluded from PLO 82, the Solicitor discusses the purpose of the withdrawal and then

considers whether inland submerged lands were included.

*** PLO 82 was directly related to prosecution of World War II. *** exploration and development of an Alaskan oil and gas supply were needed for the war effort. As private industry had not developed an oil and gas field in Alaska under the Mineral Leasing Act, the Federal Government was considering engaging in an oil and gas exploration program in an attempt to secure a source of oil for the armed forces. In order to protect the potential exploration area from interference by private claimants and lessees, it was considered necessary to withdraw the lands for exclusive federal use. *** [*Solicitor's Opinion*, M-36911, *supra*, at 165.]

The Opinion concludes on page 169:

Given the state of technology, I believe it was reasonable for the drafters of PLO 82 to perceive some threat of interference to drilling in the uplands, including in and around inland waters, but much less reason to perceive a threat of interference from private drilling in coastal submerged lands. To this extent, given the urgency of the war effort and the purpose of the 1943 withdrawal to protect federal petroleum exploitation, I believe it would have been reasonable for the drafters of PLO 82 to perceive some threat of interference to drilling in the beds of inland navigable waters, and therefore conclude that, to effectuate fully the important purpose of the Order, *inland submerged lands were intended to be included*. *** [Italics added.]

The Solicitor then considers the impact of the Submerged Lands Act and the Alaska Statehood Act, *supra*, which provided in § 6(m):

The Submerged Lands Act of 1953 *** shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

The Solicitor states:

Except for section 5(a) of the Submerged Lands Act, the coastal submerged lands or those underlying inland navigable waters would unquestionably have passed to the State upon its admission to the Union. However, sec. 5(a) (43 U.S.C. § 1313(a) (1970)), excepts from the grant to States:

"all lands expressly retained by * * * the United States when the State entered the Union (otherwise than by a general retention * * * of lands underlying the marginal sea) * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

If either of these exceptions to the broad statutory grant applies, the Submerged Lands Act is prevented from operating through the Statehood Act to relinquish the submerged lands to Alaska.

[*Solicitor's Opinion*, M-36911, *supra*, at 171.]

The Solicitor concludes that PLO 82 constituted an express retention of the submerged lands for the United States when Alaska entered the Union in 1958, and therefore prevented title to the submerged lands withdrawn by PLO 82 from passing to the State upon statehood.

Finally, the Solicitor considers the effect of revocation of PLO 82 in 1960 as follows:

The final question is whether the State automatically gained title to the lands upon revocation of PLO 82 in 1960, one year after statehood.

The short and complete answer to this contention is that it is foreclosed by the express language of section 5(a) of the Submerged Lands Act, which exempts from transfer "[a]ll lands expressly retained by * * * the United States when

the State entered the Union * * *.' 43 U.S.C. § 1313(a) (*Italics added.*) The exception operates at a fixed point in time; namely, upon statehood. The inclusion of this cause implies that if this exception is applicable at the time of statehood, it constitutes a permanent retention by the United States of those submerged lands. Thus, the subsequent revocation of PLO 82 did not divest the United States of title to the submerged lands withdrawn by PLO 82. The revocation of PLO 82 might allow the State of Alaska to select these submerged lands as part of their entitlement under the Statehood Act, subject to federal approval as required by that Act. But mere revocation of the Order could not have automatically transferred title to the State.

[*Solicitor's Opinion*, M-36911, *supra*, at 174.]

[1, 2] As to the State's asserted ownership of lands underlying the Nechelik Channel of the Colville River, the Board is bound by Secretarial policy and interpretation of law as expressed in the above-cited Solicitor's Opinion in which the Secretary concurred. The Board therefore adopts the Solicitor's conclusion that PLO 82 (8 FR 1599 (Feb. 4, 1943)) constituted an express retention for the United States of submerged lands when Alaska was admitted to the Union, and title to the submerged lands withdrawn by PLO 82 did not pass to the State of Alaska with statehood. Therefore, the Board hereby affirms that part of the decision of the Bureau of Land Management which denies the State's title to the disputed submerged lands.

EFFECT OF REGULATIONS
ON ACREAGE CHARGED
TO KUUGPIK

The Secretary's concurrence with *Opinion M-36911* has established that title to the riverbed is in the United States, regardless of the navigability of the Colville River. The question is whether Kuugpiik is now required to include the riverbed in their land selection, and subtract the acreage of the riverbed from the total acreage they are entitled to receive without regard to whether the river is navigable. The emphasis of this issue is on chargeability of acreage against Kuugpiik's entitlement, according to a published regulatory scheme, rather than on land title.

Kuugpiik asserts that, regardless of the ownership of the riverbed, published regulations of the Department require BLM to determine navigability of the Colville River and, if it is found navigable, not to charge the acreage of the riverbed against Kuugpiik's entitlement. Kuugpiik relies on the binding effect of regulations promulgated under the Administrative Procedure Act (60 Stat. 237, *as amended*, 5 U.S.C. § 553 (1976)); and argues that such regulations must be adhered to by BLM and the Board until revoked or amended through rule-making procedures. The Board agrees.

Kuugpiik bases its position on language in 43 CFR 2650.5-1:

General.

(a) Selected areas are to be surveyed as provided in section 13 of the act. Any survey or description used as a basis for conveyance must be adequate to identify the lands to be conveyed.

(b) *Surveys shall take into account the navigability or nonnavigability of bodies of water. The beds of all bodies of water determined by the Secretary to be navigable shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlements under the act.* Prior to making his determination as to the navigability of a body of water, the Secretary shall afford the affected regional corporation the opportunity to review the data submitted by the State of Alaska on the question of navigability and to submit its views on the question of navigability. Upon request of a regional corporation or the State of Alaska, the Secretary shall provide in writing the basis upon which his final determination of navigability is made. The beds of all bodies of water not determined to be navigable shall be included in the surveys as public lands, shall be included in the gross area of the surveys, and shall be charged to total acreage entitlements under the act. The beds of all nonnavigable bodies of water comprising one half or more of a section shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlement under the act, unless the section containing the body of water is expressly selected or unless all the riparian land surrounding the body of water is selected. No ground survey or monumentation will be required to be done by the Bureau of Land Management of bodies of water. [Italics added.]

BLM argues that the quoted regulation does not apply in the circumstances of this appeal because title to the beds of navigable waters within the PLO 82 withdrawal did

not vest in the State of Alaska. BLM asserts that the regulation is intended to apply only when it is necessary to determine navigability for purposes of title; *i.e.*, in the more common situation where title to the beds of navigable waters has vested in the State and such submerged lands are not public lands as defined in § 3(e) of ANCSA. Such submerged lands are excluded from conveyances to Native corporations under ANCSA and the acreage of the beds is not charged against the ANCSA land entitlement.

BLM contends that where the riverbed remains in Federal ownership regardless of navigability, it is within the definition of "public lands" in § 3(e) of ANCSA as "all Federal lands and interests therein." These submerged public lands, according to BLM's reasoning, were withdrawn for Native selection by § 11(a) of ANCSA and must be selected as required by § 12(a) of the Act and implementing regulations.

BLM's argument that all submerged public lands must be selected under ANCSA neglects consideration of the fact that the second half of 43 CFR 2650.5-1(b) clearly states that certain submerged public lands need not be selected and charged against entitlement. Regardless of public land status, lands underlying nonnavigable waters comprising one-half section or more are excluded from the gross area of the survey, and are not charged against acreage entitlement

unless selected expressly or totally surrounded by selections.

[3] The regulation read as a whole deals explicitly with chargeability of acreage and implicitly with land title, establishing two categories of submerged lands not required to be selected and charged: (1) those underlying navigable waters; and (2) those underlying nonnavigable waters of one-half section or more.

Although the regulation does not expressly state the rationale for these exclusions, the Board agrees with BLM that the first exception—submerged lands underlying navigable waters—is based on the legal premise that title to the beds of navigable waters will be in the State. Under this premise such lands are not in Federal ownership, thus are not public lands within § 3(e) of ANCSA, and cannot be selected by a Native corporation. This legal premise would be correct in most cases. (See Vol. 1, R. Clark, *Waters and Water Rights*, § 37.2(c) (1967) for the proposition that state ownership of lands beneath navigable waters is the "overwhelming majority rule.")

The second exception—submerged lands underlying nonnavigable waters comprising one-half section or more—represents a compromise between the Departmental position published as proposed rulemaking in March of 1973 and the position of the Alaska Federation of Natives, Inc., expressed as comments to the proposed rules.

The Department's original proposed rulemaking provided that the beds of all navigable water bodies were to be excluded from selections, while beds of all nonnavigable water bodies were to be selected and charged against a Native corporation's entitlement. (43 CFR 2650.5-1(b); 2651.4(c); 38 FR 6506, 6508 (Mar. 9, 1973).)

The Alaska Federation of Natives objected, relying on § 12(a) of ANCSA. AFN's position was that while § 12(a)(1) required village corporations to select all of the township or townships in which any part of a village is located, § 12(a)(2) allowed an exception related to submerged lands as follows:

Selections made under this subsection (a) shall be contiguous and in reasonably compact tracts, *except as separated by bodies of water* or by lands which are unavailable for selection, and shall be in whole sections, * * * and wherever feasible, in units of not less than 1,280 acres. [Italics added.]

AFN urged that, under this exception and similar language in § 16(b), nonnavigable bodies of water should be meandered, and conveyances upland of the meander line should include the body of water, with no charge against entitlement. (Comments of the Alaska Federation of Natives, Inc. on Proposed Alaska Natives' Selection Regulations, 38 FR 6504, Mar. 9, 1973 (Apr. 16, 1973).) (Unpublished comments transmitted by letter from Edward Weinberg to Burton W. Silcock, Director, Bureau of Land Management.)

In the final published regulations of May 30, 1973, the Department retreated from its position that all federally owned submerged land, *i.e.*, beds of nonnavigable water, must be selected and charged, to the present compromise position that allows exclusion of nonnavigable bodies of water comprising one-half section or three hundred twenty acres. (43 CFR 2650.5-1(b) 2651.4(b).) Such bodies of water are excluded from the area of survey and are not charged against entitlement, even though they meet the definition of public lands in § 3(e) of ANCSA.

BLM has argued that the regulation is applicable only when it is necessary to determine title, and that in this instance, where title has been determined on a basis other than navigability, the regulatory requirement for a navigability determination does not apply.

The Board agrees that navigability cannot be used as a test for State title or public land status in this case. Following *Solicitor's Opinion*, M-36911, the navigability determination contemplated by the regulations is not needed to determine title.

However, left unresolved by *Solicitor's Opinion*, M-36911 is the question of chargeability. Having determined that lands underlying the Nechelik Channel of the Colville River remain in Federal ownership, the *Opinion* is silent on whether or not these lands shall be charged against Kuugpik's entitlement.

[4] From the foregoing discussion it is clear that the Department has interpreted and made public its position on chargeability of federally owned submerged lands through the regulations contained in 43 CFR 2650.5-1(b). It is further clear that under these regulations, Federal ownership of submerged lands does not require all such lands to be charged a Native corporation's acreage entitlement.

BLM suggests that the question of chargeability in this appeal should be decided, not on the basis of the regulation, but rather in accordance with the Department's conclusions, designated ANCSA Issue 8 contained in an unpublished document entitled "ANCSA Implementation and Policy Review, Mar. 3, 1978". (Exhibit A, BLM brief of May 18, 1979.) The issue states: Should the acreage of federally owned submerged lands within the area of a Native corporation's selection be counted against the corporation's entitlement when conveyance is made?

The conclusion was that it should, and that navigable determinations should be made only when necessary to determine whether submerged lands were in State or Federal ownership. The issue paper states, in pertinent part:

NAVIGABLE WATER

Issue:

A. Should the acreage of Federally owned submerged lands within the area of a Native corporation's selection be counted against the corporation's entitlement when conveyance is made?

B. If yes, what procedures should be followed to determine the status of water bodies (navigable or nonnavigable) when necessary to determine State or Federal ownership?

Decision:

A. * * *

2. Where a corporation selects a section of land fronting on or including submerged lands under a water body and the ownership of the submerged land within that section is in the United States, the acreage chargeable against that corporation's entitlement includes such area of submerged lands within that section. The United States retains specific ownership of any remaining submerged lands outside of the section conveyed.

* * * * *

B. The *existing policy* should be continued with improvements sought by:

1. Reviewing land withdrawal status as of January 3, 1959, to identify 'inland' water bodies reserved to the United States at the time of Statehood. Such water bodies would not require a determination of navigability or nonnavigability.

* * * * *

Implementation:

Revise, as necessary, the regulations in 43 CFR 2650, to *clarify* the decision on chargeability [*sic*] of submerged lands acreage.

BLM to continue navigability determinations, where necessary, using existing policy and institute improvements in that procedure as specified in the decision above.

Although this policy statement was concurred in by the Secretary of the Interior, it has not as yet been submitted to the rulemaking process and published as regulations.

There is no question here as to whether the Secretary has the authority to change or modify his own policy concerning chargeability of federally owned submerged land;

Kuugpik admits that the Secretary could have promulgated a rule charging Native corporations with the beds of navigable waters where title has been retained in the United States.

However, Kuugpik argues that until such time as the Secretary amends the existing regulations in compliance with the Administrative Procedures Act, the regulation is binding on his subordinates.

[5] The Secretary is bound by duly promulgated regulations of the Department. (*Wilfred Plomis*, 34 IBLA 222 (1978) and cases cited therein.) The Board has previously held it is bound by Departmental regulations. (*Appeal of State of Alaska*, 3 ANCAB 129, 136, 86 I.D. 45, 49 (1979) [VLS 78-43].)

Government agencies must follow their own published regulations, even when a particular decision involves some discretion. Agencies may not publish regulations pursuant to the Administrative Procedure Act while at the same time producing ad hoc unpublished decisions. (*Griffin v. Harris*, 571 F.2d 767, 772 (3d Cir. 1978).)

While it is possible to speculate, as the Board has done in the foregoing discussion, about the intent of the current regulation, the wording of the regulation is clear:

* * * The beds of *all* bodies of water determined by the Secretary to be navigable shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlement under the act.

* * * [Italics added.]

[43 CFR 2650.5-1(b)]

Both the State and Kuugpik have relied on this regulatory language in the prosecution of this appeal.

[6] Therefore, as between a published regulation applicable to chargeability of submerged lands and an unpublished Departmental decision paper applicable to the same issue, the Board is bound to follow the regulation. The *Solicitor's Opinion*, M-36911, has disposed of the issue of ownership of submerged lands under the Colville River in this appeal. The question of the chargeability of such lands is resolved by regulations in 43 CFR 2650.5-1(b). Although, in connection with ANCSA Issue 8, the Department apparently intends to amend these regulations, they have not yet been amended. The Board remains bound by the current regulation. Therefore, regardless of whether the United States retains ownership of the bed of the Colville River, the Bureau of Land Management must, pursuant to 43 CFR 2650.5-1(b), determine whether the river is navigable and, if it is found navigable, must exclude the riverbed from the acreage to be charged against Kuugpik's entitlement.

The Board accordingly reverses the Bureau of Land Management decision herein appealed insofar as it fails to determine the navigability of the Colville River and insofar as its purports to charge against the acreage entitlement of Kuugpik Corp. the acreage of those submerged lands underlying the Neche-lik Channel of the Colville River in

the absence of such a finding of navigability.

gional Solicitor, on behalf of the Bureau of Land Management.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

APPEAL OF CHOGGIUNG, LTD.

3 ANCAB 325

Decided *August 17, 1979*

Appeal from a decision of the Bureau of Land Management AA-6659-A, AA-6659-B and AA-6659-C.

Reversed in part and remanded.

1. Alaska Native Claims Settlement Act: Land Selections: State Interests: Generally—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests—Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Inasmuch as the disputed gravel free use permits were transferred from one State agency, the Division of Lands, to another State agency, the Department of Highways, they do not constitute third-party interests protected as valid existing rights under § 14(g) of ANCSA.

APPEARANCES: Robert Wagstaff, Esq., Wagstaff & Middleton, on behalf of Choggiung, Ltd.; Thomas S. Gingras, Esq., on behalf of Bristol Bay Native Corporation; Martha Mills, Esq., Office of the Attorney General, on behalf of the State of Alaska; David S. Case, Esq., Office of the Re-

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

This appeal was brought by a Native Village Corporation, Choggiung, Ltd., and involves the issue of whether or not free use permits for gravel extraction issued by one State of Alaska agency to another State of Alaska agency are third-party interests constituting valid existing rights within the meaning of § 14(g) of the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 & Supp. I 1977).

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 & Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, the State Director or his delegate is the officer of the Bureau of Land Management, U.S. Department of the Interior, who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Na-

tive Claims Settlement Act, subject to appeal to this Board.

PROCEDURAL BACKGROUND

On Jan. 27, 1978, the appellant filed a Notice of Appeal from a decision of the Bureau of Land Management (BLM) dated Dec. 28, 1977. The appellant objected to identification in the decision of the following four gravel free use permits as possible third-party interests, constituting valid existing rights, in the lands approved for conveyance to the appellant:

- a. Free use permit, ADL 51371, to the State of Alaska, Department of Highways, located in W $\frac{1}{2}$ NE $\frac{1}{4}$ section 12, T. 12 S., R. 56 W., Seward Meridian.
- b. Free use permit, ADL 51372, to the State of Alaska, Department of Highways, located in NW $\frac{1}{4}$ NE $\frac{1}{4}$ section 12, T. 12 S., R. 56 W., Seward Meridian.
- c. Free use permit, ADL 51373, to the State of Alaska, Department of Highways, located in NE $\frac{1}{4}$ NE $\frac{1}{4}$ section 13, T. 12 S., R. 56 W., Seward Meridian.
- d. Free use permit, ADL 51379, to the State of Alaska, Department of Highways, located in NE $\frac{1}{4}$ section 2, T. 12 S., R. 56 W., Seward Meridian; * * *

On Mar. 22, 1978, the Board issued an order suspending all briefing pending the reconsideration of Secretary's Order No. 3016, 86 I.D. 1 (Dec. 14, 1977), relating to the Department of the Interior's policy on valid existing rights. The result of the reconsideration was Secretarial Order No. 3029, 43 FR 55287 (Nov. 27, 1978). This Order held that if, prior to passage of ANCSA, lands which were tentatively ap-

proved for selection by the State of Alaska were (a) tentatively approved or patented by the State to municipalities or boroughs or (b) patented or leased by the State with an option to buy under the "open-to-entry" program, then valid existing rights were created under ANCSA. On December 4, 1978, the suspension was terminated and the parties were granted time within which to complete their briefing schedule.

On Jan. 17, 1979, at the request of the State of Alaska, this appeal was again suspended pending settlement negotiations. On May 11, 1979, a stipulation of settlement was filed; however, the agreement did not bear the signature of any person authorized to act on behalf of the appellant.

On May 18, 1979, a conference was held concerning the stipulation. As a result the Board issued an order dated May 22, 1979, adding the Native Regional Corporation, Bristol Bay Native Corporation, as a necessary party to this appeal; terminating all suspension orders; and granting the parties seven days to reach a settlement or otherwise establishing a briefing schedule. No settlement was forthcoming and briefs were subsequently filed by the appellant, the State of Alaska, and Bristol Bay Native Corporation. The Regional Solicitor's Office relied upon pleading previously filed on Dec. 22, 1978, asserting that it concurred with the appellant "* * * that the challenged free-use permits are not 'valid existing rights' within

the meaning of the Alaska Native Claims Settlement Act." No further briefing has been received in this appeal.

ASSERTIONS OF THE PARTIES

The appellant asserts that the disputed gravel free use permits, issued by the State to State agencies, are not third-party interests constituting valid existing rights within the meaning of § 14(g) of ANCSA, as interpreted by this Board in prior decisions or by the Secretary in Order No. 3029, *supra*; therefore, the permits should not have been identified as valid existing rights by BLM in the decision on appeal. Both the Regional Solicitor's Office, on behalf of BLM, and Bristol Bay Native Corporation concur with the appellant's position.

The State of Alaska, the only other party to this appeal, contends that these interests, though transferred from one State of Alaska agency to another, were created in the normal course of business just as any third-party interests would be, and are thus valid existing rights within the meaning of § 14(g) of ANCSA, properly so identified by BLM in its decision.

DISCUSSION

The lands in issue were tentatively approved to the State of Alaska on Dec. 23, 1963, following a general purposes grant selection filed by the State in 1961. On Dec. 18, 1971, these affected lands were withdrawn by § 11(a) (43 U.S.C.

§ 1610(a) (1976)) of ANCSA and subsequently selection applications were filed by the appellant pursuant to § 12(a) (43 U.S.C. § 1611(a) (1976)) of the Act. After tentative approval of the lands in the State, but before the effective date of ANCSA, the four gravel free use permits in question were issued by the Alaska Division of Lands to the Alaska Department of Highways for the extraction of gravel.

Sec. 11(a) of ANCSA, *supra*, enumerates the public lands which are withdrawn and available, "subject to valid existing rights," for selection by the Native corporations under the terms of the Act and § 11(a) (2) specifically states:

All lands located within the townships described in subsection (a) (1) hereof that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act.

All parties to this appeal agree that the lands in issue were lands: "* * * selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act." This being the situation, clearly the lands sought by the appellant in its original selection application were lands withdrawn and available for selection.

The only issue in this appeal is: whether or not the four gravel free use permits issued by one State of

Alaska agency to another State of Alaska agency are third-party interests constituting valid existing rights within the meaning of § 14 (g) of ANCSA (43 U.S.C. § 1613 (g) (1976)) which provides in pertinent part:

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. * * *

This question has been previously decided by the Board, and the Board's ruling was not affected by Secretary's Order No. 3029, 43 FR 55287 (1978).

While the Secretary in Order 3029, *supra*, concluded that State grants of tentatively approved lands to municipal governments, or to individuals under the "open-to-entry" program, were valid existing rights, he did not discuss the status of permits issued by the State to its own agencies. Therefore, the Board's prior decision is dispositive of the issue.

In *Appeals of the State of Alaska & Seldovia Native Ass'n., Inc.*, 2 ANCAB 1, 84 I.D. 349 at p. 378 (1977) [ANCAB VLS 75-14/75-15], the Board found that State

issued permits for resource use which were issued to third parties prior to December 18, 1971, were protected as valid existing rights. However, in the same decision the Board concluded:

* * * the State cannot defeat Native selection rights by, in effect, setting itself up as a third party whose interests are protected. Congress clearly intended to make tentatively approved State selections, within Native withdrawal areas available for Native selection in total amounts up to 69,120 acres. Transfer by the State of a permit to extract natural resources from one State agency to another does not place the State in a position of a protected third party. When an interest in land selected by and tentatively approved to the State of Alaska was transferred from the State Division of Lands to the State Division of Aviation, the complete interest in the land remained in the State of Alaska and therefore remained subject to the withdrawal and selection provision of secs. 11(a) and 12 of ANCSA. The State of Alaska's interest in lands previously selected and TA'd to the State, which fall within the withdrawal areas described in secs. 11(a) (1) and (2) of ANCSA, are withdrawn for selection by Native Corporations by secs. 11(a) (1) and (2) of ANCSA and do not constitute valid existing rights within the meaning of secs. 11(a) or 14(g) of ANCSA. [84 I.D. 378]

[1] Inasmuch as the disputed gravel free use permits were transferred from one State agency, the Division of Lands, to another State agency, the Department of Highways, they do not constitute third-party interests protected as valid existing rights under § 14(g) of ANCSA. The State's entire interest in these tentatively approved lands

was available for selection by the appellant and the Bureau of Land Management erred in identifying the four permits as possible third-party interests constituting valid existing rights within the meaning of § 14(g) of ANCSA.

ORDER

In accordance with the foregoing decision, this appeal is hereby Ordered remanded to the Bureau of Land Management with the instruction that the lands in issue be conveyed to the appellant absent any identification of the four gravel free

use permits in issue. Relief sought by the State of Alaska regarding guidance on the payment of revenues to the regional corporations is denied as an issue beyond the jurisdiction and function of the Board.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

LAWRENCE MATSON,
Administrative Judge.

APPEAL OF ALASKA RAILROAD***3 ANCAB 273**

Decided June 7, 1979

Appeal from the Decision of the Bureau of Land Management (BLM) AA-6661-A to issue patents numbered 50-78-0015 and 50-78-0016.

Dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

The effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction of the Department of the Interior over the lands conveyed. The proper forum to further adjudicate the status of such an interest is in a judicial proceeding and the Board lacks jurisdiction to decide the issue.

2. Alaska Native Claims Settlement Act: Definitions: Public Lands

Lands withdrawn pursuant to ANCSA are held for the benefit of Indians, Aleuts, and Eskimos, and thus are not "public lands" within the scope of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1782 (1976). 43 U.S.C. § 1702(e) (1976).

3. Alaska Native Claims Settlement Act: Land Selections: Withdrawals

Lands withdrawn pursuant to ANCSA are not subject to § 316 of FLPMA, 43 U.S.C. § 1746 (1976).

*Not in chronological order.

APPEARANCES: William J. Wong, Esq., on behalf of the appellant; Edward G. Burton, Esq., Burr, Pease & Kurtz, Inc., on behalf of Eklutna, Inc.; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Joyce E. Bamberger, Esq., on behalf of Cook Inlet Region, Inc.

*OPINION BY
ALASKA NATIVE CLAIMS
APPEAL BOARD*

SUMMARY OF APPEAL

The United States, on Dec. 7, 1977, issued patent number 50-78-0015 to Eklutna, Inc. and patent number 50-78-0016 to Cook Inlet Region, Inc. for the surface and subsurface estates, respectively, of the land described in the patents. The Alaska Railroad, an agency of the United States Department of Transportation, entered this appeal challenging conveyance of the land without excepting from the conveyance, pursuant to § 3(e) of the Alaska Native Claims Settlement Act (hereinafter ANCSA), an existing right-of-way of the Alaska Railroad across the lands described in the subject patents. The initial question is whether the Board, following the issuance of the patents, has jurisdiction to resolve questions of fact or law over the lands described in these patents.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation

of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 & Supp. I 1977), and the implementing regulations in 43 CFR Part 2650, *as amended*, 41 FR 14737 (1976), and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650, *as amended*, and 43 CFR Part 4, Subpart J, the State Director or his delegate is the officer of the Bureau of Land Management, United States Department of the Interior, who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

PROCEDURAL BACKGROUND

On Feb. 5, 1979, the appellant filed its Notice of Appeal from the above-referenced decision of the BLM. This Board subsequently issued an order that appellant show cause within thirty (30) days why the appeal should not be dismissed due, *inter alia*, to lack of jurisdiction in the Board to decide an appeal affecting lands on which interim conveyance or patent has issued.

Appellant, responding to the Board's Order to Show Cause, asserted (1) lack of authority on the part of the BLM to issue a patent to the particular land in controversy,

and (2) consequent jurisdiction of the Board over the appeal.

The Bureau of Land Management, through the Office of the Regional Solicitor, subsequently moved to dismiss the appeal on the ground that the Department of the Interior has no jurisdiction over patented lands. Eklutna, Inc. joined in BLM's motion to dismiss. Cook Inlet Region, Inc. thereafter independently moved to dismiss the appeal on the same ground.

DECISION AND ORDER

[1] This Board has consistently denied jurisdiction in itself over land to which patent has issued:

The effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction of the Department of the Interior over the lands conveyed. [Citations omitted.] The proper forum to further adjudicate the status of such an interest is in a judicial proceeding and the Board lacks jurisdiction to decide the issue.

[*Appeal of Choggiung, Limited*, 3 ANCAB 100, 103 (Nov. 20, 1978) [VLS 78-49].]

See also, *Appeal of State of Alaska/Seldovia Native Ass'n., Inc.*, 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75-14/75-15]; *Appeal of Eklutna, Inc.*, 1 ANCAB 305, 84 I.D. 105 (1977) [VLS 75-1].

In spite of the foregoing, the Alaska Railroad contends that this Board has jurisdiction by virtue of § 316 of the Federal Land Policy and Management Act (43 U.S.C. § 1746 (1976)) (hereinafter FLPMA). The Railroad also cites *United States v. Washington*, 233

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F.2d 811 (9th Cir. 1956), in support of its position that the Board has jurisdiction over lands already patented. The Railroad's reliance is misplaced.

The term "public lands" as used in 43 U.S.C. § 1746 is defined in 43 U.S.C. § 1702(e) as:

[A]ny land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, * * * except—

* * * * *

(2) lands held for the benefit of Indians, Aleuts, and Eskimos.

[2] ANCSA withdrew certain lands in order to protect their status quo pending selection by, and conveyance to, Native village and regional corporations. Thus, lands withdrawn pursuant to ANCSA are "lands held for the benefit of Indians, Aleuts, and Eskimos," and are not "public lands" within the scope of 43 U.S.C. § 1746 (1976).

[3] The lands which are the subject of the present appeal, prior to their conveyance to Eklutna, Inc., were withdrawn pursuant to ANCSA. Consequently, following their withdrawal, these lands were not "public lands" as that term is used in FLPMA, and were thus not within the scope of 43 U.S.C. § 1746 (1976). Thus, 43 U.S.C. § 1746 (1976) is not applicable in the instant situation.

Further, the Board is not persuaded by *United States v. Washington*, *supra*. The decisions cited therein do not establish authority for the nonjudicial cancellation or

nullification of a patent already issued. Moreover, these decisions do not establish the validity of a second patent issued in lieu of a prior patent. *United States v. Stone*, 69 U.S. (2 Wall.) 525, 17 L.Ed 765 (1864); *Germania Iron Co. v. United States*, 165 U.S. 379, 17 S. Ct. 337, 41 L.Ed. 754 (1897); *United States v. Joyce*, 240 F. 610, 615 (8th Cir. 1917); *Eells v. Ross*, 64 F. 417, 420 (9th Cir. 1894); cited in *United States v. Washington*, 233 F. 2d 811, 817 (9th Cir. 1956).

Regarding administrative nullification of a patent, the following language from *United States v. Stone*, *supra*, is still the law of the land:

Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court. [69 U.S. 525, 535 (Italics added).]

The Ninth Circuit Court of Appeals, in quoting the above statement in *United States v. Washington*, *supra*, omitted the underlined portion. The Circuit Court thus took sentences out of context and reversed the clear holding of the Supreme Court.

The above-quoted language is binding on this Board and dispositive of the instant appeal.

Thus, the Board has no jurisdiction over this appeal and must grant the motions to dismiss. Such dismissal is without regard to the merits of the appeal, which must be heard, if at all, in a judicial forum.

It is therefore Ordered that this appeal is hereby dismissed for the reasons stated. The Bureau of Land Management decision appealed from is left unaffected by this decision.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

PERMIT REQUIREMENTS FOR DISCHARGE OF DREDGED OR FILL MATERIAL UNDER SEC. 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT, 33 U.S.C. § 1344*

M-36915

August 27, 1979

Bureau of Reclamation: Environment—Navigable Waters—Water Pollution Control: Federal Water Pollution Control Act: Generally

The requirement for a permit under sec. 404 of the Federal Water Pollution Control Act applies to the Bureau of Reclamation to the same extent as any other person, and with certain exceptions the Bureau must obtain a permit from the Corps of Engineers prior to any discharge

of dredged or fill material into the navigable waters.

Bureau of Reclamation: Environment—Navigable Waters—Water Pollution Control: Federal Water Pollution Control Act: Generally

Activities "affirmatively authorized by Congress," which are excepted from sec. 10 of the Rivers and Harbors Act of 1899, are *not* excepted from sec. 404 of the Federal Water Pollution Control Act. Notwithstanding the exception of a discharge of dredged or fill material under sec. 10 of the Rivers and Harbors Act, compliance with sec. 404 is required.

Bureau of Reclamation: Environment—Navigable Waters—Water Pollution Control: Federal Water Pollution Control Act: Generally

A permit under sec. 404 of the Federal Water Pollution Control Act is required for the discharge of dredged or fill material whenever: (a) The "discharge" constitutes any addition of any pollutant to navigable waters from any discernible, confined and discrete conveyance, including the placement of fill and the building of any structure or impoundment; and (b) The "dredged material" is dredged spoil that is excavated or dredged from the waters of the United States; or (c) The "fill material" includes any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody, including any structure which requires rock, sand, dirt or other material for its construction; and (d) The discharge is made into "waters of the United States," which extend beyond those waters meeting the traditional tests of navigability to those encompassed by the broadest possible Constitutional interpretation.

Bureau of Reclamation: Environment—Environmental Policy Act—Environmental Quality: Environmental Statements—National Envi-

*Not in chronological order.

ronmental Policy Act of 1969; Environmental Statements—Water Pollution Control: Federal Water Pollution Control Act: Generally

To secure the exemption under sec. 404(r) of the Federal Water Pollution Control Act for projects described in an environmental statement, compliance with seven specific conditions is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 of the Act for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.

Bureau of Reclamation: Environment—Water Pollution Control: Federal Water Pollution Control Act: Generally

To secure the exemption under sec. 404 (f) (1) of the Federal Water Pollution Control Act for the maintenance of currently serviceable structures, compliance with four specific conditions is required. The exemption does not apply to the discharge of dredged material incident to maintenance dredging, or to new construction.

*OPINION BY OFFICE OF
THE SOLICITOR*

TO: COMMISSIONER, BUREAU OF
RECLAMATION
FROM: SOLICITOR

SUBJECT: PERMIT REQUIREMENTS
FOR THE DISCHARGE OF DREDGED
OR FILL MATERIAL UNDER SEC. 404
OF THE FEDERAL WATER POLLU-
TION CONTROL ACT, 33 U.S.C.
§ 1344

Under sec. 404, 33 U.S.C. § 1344, of the Federal Water Pollution Control Act, *as amended by the Clean Water Act of 1977*, 33 U.S.C. § 1251 *et seq.* (Supp. I 1977) (the Act), a permit may be issued by the Corps of Engineers for the discharge of dredged or fill material into the waters of the United States. On several occasions our opinion has been requested on the application of sec. 404 to activities of the Bureau of Reclamation. In view of this apparently widespread need within the Bureau for guidance on this topic, we have prepared for your information the following general analysis of the requirements for complying with sec. 404.

The complexity of the Act, and sec. 404 in particular, precludes our answering, or even anticipating, all of the numerous legal questions which might arise in the application of sec. 404 to Bureau activities. Thus, the following analysis should be regarded as an overview, rather than as a comprehensive substitute for individual guidance on specific legal issues. With this qualification in mind, we have considered the following questions:

Questions Presented

1) To what extent does the requirement for a permit under sec. 404 of the Act apply to activities of the Bureau of Reclamation?

2) Are Bureau of Reclamation activities that are "affirmatively authorized by Congress," and thus excepted from sec. 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1976), similarly excepted from sec. 404 of the Act?

3) Under what general circumstances is a permit under sec. 404 of the Act required for the discharge of dredged or fill material?

4) What are the conditions for securing the exemption under sec. 404(r) of the Act for projects described in an environmental impact statement (EIS)? Does this exemption apply to the maintenance of existing projects? How does the exemption affect the standards that apply to the discharge of dredged or fill material?

5) What are the conditions for securing the exemption under sec. 404(f) (1) of the Act for the maintenance of currently serviceable structures? To what extent does this exemption apply to the discharge of dredged material?

Summary Opinion

The following summary answers are numbered to correspond with the five numbered questions presented in the preceding section.

1) The requirement for a permit under sec. 404 of the Act applies to the Bureau of Reclamation to the same extent as any other person, and with certain exceptions the Bureau

must obtain a permit from the Corps of Engineers prior to any discharge of dredged or fill material into the navigable waters.

2) Activities "affirmatively authorized by Congress," which are excepted from sec. 10 of the Rivers and Harbors Act of 1899, are *not* excepted from sec. 404 of the Act. Notwithstanding the exception of a discharge of dredged or fill material under sec. 10, compliance with sec. 404 is required.

3) A permit under sec. 404 of the Act is required for the discharge of dredged or fill material in the following general circumstances:

(a) The "discharge" constitutes any addition of any pollutant to navigable waters from any discernible, confined and discrete conveyance, including the placement of fill and the building of any structure or impoundment; and

(b) The "dredged material" is dredged spoil that is excavated or dredged from the waters of the United States; or

(c) The "fill material" includes any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody, including any structure which requires rock, sand, dirt or other material for its construction.

(d) The discharge is made into "waters of the United States," which extend beyond those waters meeting the traditional tests of navigability to those encompassed

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by the broadest possible Constitutional interpretation.

4) To secure the exemption under sec. 404(r) of the Act for projects described in an EIS, compliance with the seven specific conditions listed in this opinion in sec. IV.A. and analyzed in sec. IV.D. is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.

5) To secure the exemption under sec. 404(f) (1) of the Act for the maintenance of currently serviceable structures, compliance with the four specific conditions listed in this opinion in sec. V.B. and analyzed in sec. V.D. is required. The exemption does not apply to the discharge of dredged material incident to maintenance dredging, or to new construction, but only to the maintenance of currently serviceable structures.

Discussion

This discussion is divided into five parts designated by Roman numerals corresponding with the five numbered questions and summary answers presented in the preceding sections. For convenience,

each question is restated immediately preceding the related discussion.

I. GENERAL APPLICATION OF SECTION 404 TO ACTIVITIES OF THE BUREAU OF RECLAMATION

Question No. 1: To what extent does sec. 404 of the Act apply to activities of the Bureau of Reclamation?

I.A. Prohibition Against Discharge of Pollutants

The objective of the Federal Water Pollution Control Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a), 33 U.S.C. § 1251 (1976).

The basic mechanism of the Act for achieving this objective is a blanket prohibition against the discharge of any pollutant into the waters of the United States, except as in compliance with certain standards and permit requirements. This blanket prohibition is contained in sec. 301(a) of the Act, which states:

Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful. [33 U.S.C. § 1311(a) (1976).]

Under sec. 502(6) of the Act, 33 U.S.C. § 1362(6) (1976), the term "pollutant" includes "dredged spoil" as well as "rock" and "sand,"

two types of material that generally constitute fill. Thus, sec. 301(a) applies to the discharge of dredged or fill material. For a more detailed analysis of the definition of "pollution" as applied to fill material, see the discussion of Question No. 3, and particularly secs. III.E.1. to III.E.3., below.

I.B. Exception for Discharge of Dredged or Fill Material

As indicated in sec. 301(a), an exception to the general prohibition against the discharge of water pollutants is found in sec. 404 of the Act. Sec. 404, which applies to the discharge of dredged or fill material, states in the relevant portion of subsec. (a):

The Secretary [of the Army] may issue permits, after notice and opportunity for public hearing for the discharge of dredged or fill material into the navigable waters at specified disposal sites. [33 U.S.C. § 1344(a) (Supp. I 1977).]

Thus, the Act specifically provides for discharges of pollutants in the form of dredged or fill material. Before discharging any dredged or fill material into the navigable waters, however, any person subject to sec. 301(a) must obtain from the Secretary of the Army, through the Corps of Engineers, a sec. 404 permit. As is shown in the following discussion, the Bureau of Reclamation is a "person" subject to sec. 301(a), and therefore must obtain a sec. 404 permit in appropriate circumstances.

I.C. Federal Compliance with the Act

The requirements for Federal compliance with water pollution control measures in general, and the Act in particular, are set out in sec. 313(a) of the Act, which states in the relevant portion:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural * * *, (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process or sanction, whether enforced in Federal, State or local courts or in any other manner. [33 U.S.C. § 1323(a) (Supp. I 1977).]

Under this section, the Federal Government, including the Bureau of Reclamation, is subject to the requirements of the Act to the same extent as any other person. This includes the prohibition of sec. 301(a) against the discharge of pollutants, as well as the requirement for a discharge permit under sec. 404.

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I.D. Conclusion

Thus, the requirement for a permit under sec. 404 of the Act applies to the Bureau of Reclamation to the same extent as any other person, and with certain exceptions the Bureau must obtain a permit from the Corps of Engineers prior to any discharge of dredged or fill material into the navigable waters.

II. SEC. 404 AND THE RIVERS AND HARBORS ACT SEC. 10 EXEMPTION

Question No. 2: Are Bureau of Reclamation activities that are "affirmatively authorized by Congress," and thus excepted from sec. 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, similarly excepted from sec. 404 of the Act?

II.A. The Rivers and Harbors Act of 1899

Sec. 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, Mar. 3, 1899, states:

The creation of any obstruction not *affirmatively authorized by Congress*, to the navigable capacity of any of the waters of the United States is prohibited; * * * and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity * * * of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineering and author-

ized by the Secretary of the Army prior to beginning the same. [33 U.S.C. § 403.] (*Italics added.*)

Under this section a recommendation by the Chief of the Army Corps of Engineers and authorization by the Secretary of the Army are required for certain activities in the waters of the United States. An exception to this requirement is explicitly granted for projects "affirmatively authorized by Congress." Because sec. 10 of the Rivers and Harbors Act and sec. 404 of the Act apply to the same general types of projects, it has been suggested that the sec. 10 exception of a project "affirmatively authorized by Congress" creates a similar exception to the requirements of sec. 404. Despite the administrative appeal of this suggestion, it has no legal basis. There are, however, convincing arguments to the contrary.

II.B. An Express Exception Precludes Implied Exceptions

It is a general principle of statutory construction that an express exception in a statute precludes implied exceptions. See: E. Crawford, *The Interpretation of Law*, § 299; 2A. Sands, *Statutes and Statutory Construction*, § 47.11 (4th ed. 1973). Such an express exception to sec. 404 is found in sec. 404(r), which states:

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by

Congress, whether prior to or on or after the date of enactment of this subsection, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 301(a) or 402 of the Act (except for effluent standards or prohibitions under section 307), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b) (1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 and such environmental impact statements has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project prior to authorization of such project or appropriation of funds for such construction.

[91 Stat. 1605, 33 U.S.C. § 1344(r) (1976).]

Under the rules of statutory construction, this express exception to the prohibitions of the Act, and particularly sec. 404, precludes an implied exception under sec. 10 of the Rivers and Harbors Act.

Furthermore, under sec. 10 the only condition to securing the exception is that the project is "affirmatively authorized by Congress." Sec. 404(r) imposes a similar condition, namely that the project is "specifically authorized by Congress," as well as a number of additional conditions designed to insure that the broader objectives of the Act are met. It would be contrary to all rules of logic to conclude that the Congress intended the Act to come under the sec. 10 exception when the requirements of the Act itself are considerably more stringent. Clearly, in view of the more

exacting conditions expressed in sec. 404(r), the sec. 10 exception has no effect on either the prohibition of sec. 301(a) of the Act against the discharge of pollutants or the requirement to obtain a discharge permit under sec. 404.

II.C. Scenic Hudson Preservation Conference v. Callaway

A similar legal distinction between sec. 10 and sec. 404 was found in an analogous situation in *Scenic Hudson Preservation Conference v. Callaway*, 370 F.Supp. 162 (S.D.-N.Y. 1973), *aff'd*, 499 F.2d 127 (2d Cir. 1974). There the district court held that the Consolidated Edison Co., a public utility, was exempt from sec. 10 by the Federal Power Act of 1920, 16 U.S.C. § 792 *et seq.* (1976), but *not* from sec. 404. In response to Consolidated Edison's argument that sec. 404 did not apply to hydroelectric power plants, the court found that:

Congress would not design an Act which on its face is all-inclusive, but for the specifically enumerated exceptions, and yet intend to establish an unmentioned exception of the scale suggested here. Without any indication that Con Ed's reading of the Congressional will is accurate, the carving out of so major an exception would be improper. [370 F.Supp. at 170.]

Although Consolidated Edison was not a Federal agency, and was not seeking a Congressional authorization exception under sec. 10, this reasoning in *Scenic Hudson* is applicable here. For as was true in *Scenic Hudson*, neither the Act nor

its legislative history contains even the slightest hint that the Congress intended to couple to the express exception to sec. 10 an implied exception to sec. 404.

II.D. Conclusion

Thus, we conclude that activities "affirmatively authorized by Congress," which are excepted from sec. 10 of the Rivers and Harbors Act of 1899, are *not* excepted from sec. 404 of the Act. Notwithstanding the exception of a discharge of dredged or fill material under sec. 10, compliance with sec. 404 is required.

III. CIRCUMSTANCES REQUIRING A PERMIT UNDER SEC. 404

Question No. 3: Under what general circumstances is a permit under sec. 404 of the Act required for the discharge of dredged or fill material?

III.A. The Language of Section 404(a)

Under sec. 404(a) of the Act:

The Secretary [of the Army] may issue permits, after notice and opportunity for public hearing for the discharge of dredged or fill material into the navigable waters at specified disposal sites. [33 U.S.C. § 1344(a) (Supp. I 1977).]

For purposes of Question No. 3, the language of concern in sec. 404(a) is the phrase, "discharge of dredged or fill material into the

navigable waters." This phrase includes four distinct statutory terms of art—"discharge," "dredged material," "fill material," and "the navigable waters"—and it is necessary to understand the meaning of each term in the context of the Act to determine the general circumstances where sec. 404 applies. The meaning of each of these terms is discussed below.

III.B. The Meaning of "Discharge"

Under sec. 502(16) of the Act:

The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants. [33 U.S.C. § 1362(16) (1976).]

By its own terms, this definition is explicitly limited to the use of the term "discharge" without qualification. But in sec. 404(a) the term "discharge" is qualified by the phrase "of dredged or fill material." Thus, there is a question of whether the definition in sec. 502(16) applies to the use of the term "discharge" in sec. 404(a). For the following reasons, it obviously does. First, this is the only instance where the Act defines the term "discharge," and the best indication given of its general meaning. Second, it is not entirely clear that the phrase "of dredged or fill material" comprises a qualification within the meaning intended by sec. 502(16). And third, as was noted in the previous discussion of Question No. 1, the prohibition of sec. 301(a), and thus the exception

of sec. 404(a), applies to the "discharge of any pollutant," so the meaning of the term "discharge" in sec. 404(a) logically comes under this definition. For the definition of "pollutant" itself, see the immediately following secs. III.C. and III.D. of this opinion, which consider the meaning of "dredged material" and "fill material."

The definition of "discharge" is further amplified by sec. 502(12), under which:

The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft. [33 U.S.C. § 1362(12) (1976).]

Since considerations of "the contiguous zone" and "the ocean" are not particularly relevant for Bureau of Reclamation purposes, we will limit this discussion to subsec. 502(12) (A), which concerns the navigable waters. Thus, for purposes of this opinion the Act defines "discharge" as "any addition of any pollutant to navigable waters from any point source."

To further clarify this definition of "discharge" it is necessary to define the term "point source." Under sec. 502(14):

The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This

term does not include return flows from irrigated agriculture. [33 U.S.C. § 1362(14) (Supp. I 1977).]

Thus, combining the relevant portions of secs. 502(16), 502(12) (A) and 502(14), the Act defines "discharge" as "any addition of any pollutant to navigable waters from any discernible, confined and discrete conveyance."

Since the terms "addition" and "discernible, confined and discrete conveyance" are extremely broad, it is clear that the precise physical mechanism by which a discharge takes place is of secondary concern, and what is primarily relevant is that a pollutant is added to navigable waters. Since the definition of "point source" in sec. 502(14) is not limited to the listed conveyances, numerous others which are "discernible, confined and discrete" would also qualify. An exhaustive determination of the numerous conveyances by which a discharge might occur is beyond the scope of this opinion.

The Corps of Engineers, the Federal agency responsible for administering the sec. 404 permit program, in their regulations on Permits for Discharges of Dredged or Fill Material into Waters of the United States (the Corps of Engineers Permit Regulations), 42 FR 37122-37164 (July 19, 1977), *to be codified* as 33 CFR Part 323, has interpreted the meaning of "discharge" in the context of defining the terms "discharge of dredged material" and "discharge of fill material."

Under the Corps of Engineers Permit Regulations:

The term "discharge of dredged material" means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified disposal site located in waters of the United States and the run-off or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Federal Water Pollution Control Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products. [33 CFR § 323.2(I).]

And:

The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and

artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products. [33 CFR § 323.2 (n).]

The Corps of Engineers' interpretation of the meaning of "discharge" in these regulations differs from the Act only in that sec. 323.2(n), which defines the term "discharge of fill material," clarifies the term "addition" to include "placement of fill" and "building of any structure or impoundment requiring rock, sand, dirt or other material for its construction." Under accepted principles of statutory construction, this interpretation of the Corps of Engineers is entitled to great weight and should be followed unless there are compelling reasons that it is wrong. *E. I. du Pont de Nemours & Co. v. Collins*, 97 S.Ct. 2229, 2234, 53 L.Ed.2d 100, 108, 432 U.S. 46, 54-55, (Sup. Ct. 1977). Since the terms "placement" and "building" are well within the scope of "addition" in this context, there are no compelling reasons that the interpretation of the Corps is wrong and it should be followed.

This interpretation of the meaning of "discharge of fill material" by the Corps of Engineers as applicable to the building of any structure or impoundment requiring rock, sand or dirt for its construction was upheld by the U.S. Court of Appeals for the Eighth Circuit in *Minnehaha Creek Watershed District v. Hoffman*, ——— F.

2d. ———, 13 ERC 1009 (8th Cir., Apr. 23, 1979), *rev'g* 449 F. Supp. 876 (D. Minn. 1978). The district court had held that the placement of riprap and the construction of dams did not constitute the discharge of a pollutant under sec. 301 of the Act because in its opinion such activities did not significantly alter water quality even though they incidentally involved the discharge of rock and sand, two types of material which the Act defines as "fill." The court of appeals reversed the district court on this issue and held that the placement of riprap and the construction of dams comes within the purview of secs. 301 and 404 of the Act as involving the discharge of a pollutant. The court of appeals stated:

We believe that the construction of dams and riprap in navigable waters was clearly intended by Congress to come within the purview of §§ 301 and 404 of the Act. By including rock, sand and cellar dirt in the list of polluting substances, Congress recognized that the addition of these substances could affect the physical, as well as the chemical and biological, integrity of a waterbody. Since the construction of dams or riprap admittedly involves the placement of rock, sand or cellar dirt into the body of water, such activities would appear to come within the plain meaning of the Act. 13 ERC at 1016.

Thus, there is judicial precedent for following the broadened interpretation of "discharge of fill material" by the Corps of Engineers as applicable to the building of structures. Accordingly, the best general definition of the term "discharge" is "any addition of any pol-

lutant to navigable waters from any discernible, confined and discrete conveyance, including the placement of fill and the building of any structure or impoundment."

III.C. The Meaning of "Dredged Material"

The Act does not explicitly define the term "dredged material," and it is necessary to determine its meaning indirectly.

As noted previously in the discussion of Question No. 1, sec. 301(a) prohibits "the discharge of any pollutant." Sec. 404(a) of the Act provides an exception to this prohibition and empowers the Secretary of the Army to issue permits "for the discharge of dredged * * * material." Since sec. 301(a) applies only to pollutants, sec. 404(a) applies only in those circumstances where the discharged dredged material is defined by the Act as a "pollutant." Thus, the meaning of "dredged material" in sec. 404(a) depends on the way the Act defines the term "pollutant."

Under sec. 502(6) of the Act, 33 U.S.C. § 1362(6) (1976), the term "pollutant" is defined to include "dredged spoil." This leads to the somewhat circular conclusion that "dredged material" is "dredged spoil."

Looking beyond the definition of "pollutant," sec. 502(19) of the Act, 33 U.S.C. § 1362(19) (1976), defines the analagous term "pollution" to mean "the man-made or man-induced alteration of the chemical,

physical, biological, and radiological integrity of water." While reference to this definition of "pollution" would greatly clarify the meaning of "pollutant," there is nothing to indicate that the Act treats these two terms as synonymous, and therefore such a reference would be improper.

The legislative history of the Act sheds no light on the meaning of "dredged material."

Finally, as interpreted by the Corps of Engineers Permit Regulations, "dredged material" is defined to mean "material that is excavated or dredged from waters of the United States." 33 CFR 323.2(k). As noted in a previous section of this discussion, this interpretation of the Corps of Engineers is entitled to great weight and should be followed unless there are compelling reasons that it is wrong. *E.I. du Pont de Nemours & Co. v. Collins*, 97 S.C. 2229, 2234, 53 L.Ed.2d 100, 108, 432 U.S. 46, 54-55, (Sup. Ct. 1977). Although the Act does not limit the origin of dredged material to "waters of the United States," as does the Corps of Engineers, it is unlikely that the Bureau of Reclamation would obtain such material from elsewhere, and therefore this limitation is not unreasonable for purposes of this opinion.

Thus, combining the definition of the Act with the interpretation of the Corps of Engineers, the term "dredged material" in sec. 404

means "spoil material that is excavated or dredged from waters of the United States."

III.D. The Meaning of "Fill Material"

The Act does not explicitly define the term "fill material," and it is also necessary to determine its meaning indirectly.

As was noted for "dredged material" in the previous section of this discussion, sec. 301(a) and 404(a) of the Act apply only in those circumstances where the discharged material is defined by the Act as a "pollutant." Thus, the meaning of "fill material" in sec. 404(a) depends on the way the Act defines the term "pollutant."

Sec. 502(6) of the Act, 33 U.S.C. § 1362(6) (1976), defines the term "pollutant" to include, among other things, "rock, sand, [and] cellar dirt," three types of material that commonly constitute "fill." Other types of materials and structures that are commonly used as or thought of as "fill" are not recited. Although it would appear from this limited definition of "pollutant" that the scope of "fill material" under the Act is therefore limited to rock, sand, and cellar dirt, there is compelling evidence for a much broader interpretation that would include other materials, as well as such structures as dams, riprap, etc., which incidentally em-

ploy rock, sand or cellar dirt in their construction.

III.D.1. The Legislative History of the Act

The legislative history of the Act supports a broader interpretation of "fill material" in clear and unambiguous terms. The Senate Report on S. 1952, the bill from which sec. 404(f) (1) derived, states:

The amendment [to sec. 404] exempts from permit requirements the maintenance and emergency reconstruction of existing fills such as highways, bridge abutments, dikes, dams, levees, and other currently serviceable structures. S. Rep. No. 95-370, 95th Cong., 1st Sess. 76, reprinted in [1977] 3 U.S. Code Cong. & Ad. News, 4326, 4401. (Italics added.)

Thus, the Senate Report explicitly uses the term "fills" to include various structures that do not fit neatly within the sec. 502(6) definition of the term "pollution" as "rock, sand, [and] cellar dirt."

III.D.2. The Corps of Engineers Permit Regulations

As interpreted by the Corps of Engineers, the Federal agency responsible for administering the sec. 404 permit program:

(m) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. * * *

(n) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement

of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills, dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. [42 FR 37121, 37145 (July 19, 1977), to be codified as 33 CFR 323.2(m) and 323.2(n).]

As noted in Sec. III.B. of this discussion, this interpretation of the Corps of Engineers is entitled to great weight and should be followed unless there are compelling reasons that it is wrong. *E. I. du Pont de Nemours & Co. v. Collins*, 97 S.Ct. 2229, 2234, 53 L.Ed. 2d 100, 108, 432 U.S. 46, 54-55 (S. Ct. 1977). In view of the preceding arguments which support the Corps' interpretation of the term "fill material," there are no compelling reasons that it is wrong and it should be followed. As also noted in Sec. III.B., in the discussion of the meaning of "discharge," the U.S. Court of Appeals for the Eighth Circuit has upheld the Corps of Engineers' interpretation of "fill material" in the case of *Minnehaha Creek Watershed District v. Hoffman*, — F.2d —, 13 ERC 1009 (8th Cir. Apr. 23, 1979) rev'g 448 F.Supp. 876 (D. Minn. 1978).

III.D.3. Conclusion to the Meaning of "Fill Material"

Thus, rather than being limited by a narrow reading of the definition of "pollution" in sec. 502(6) of the Act, it appears that the meaning of "fill material" is more accurately defined by the Corps of Engineers' permit program regulations at 33 CFR 323.2(m), as quoted above. As the companion definition of the term "discharge of fill material" at 33 CFR 323.2(n), which is also quoted above, lends additional insight into the Corps of Engineers' interpretation by including various structures, it is appropriate to read these two sections together as the best available definition of the meaning of "fill material." Thus, "fill material" includes "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody, including any structure which requires rock, sand, dirt or other material for its construction."

III.E. The Meaning of "Navigable Waters"

Under sec. 502(7) of the Act:

The term "navigable waters" means the waters of the United States, including the territorial seas. [33 U.S.C. §1362(7) (1976).]

Since this definition is itself unclear, and since the Act does not define the term "waters of the United

States," it is necessary to look outside the Act for clarification.

In the case of *State of Wyoming v. Hoffman*, 437 F.Supp. 114 (D. Wyo. 1977), the district court considered the meaning of the term "navigable waters," as used in sec. 404 of the Act. It held that the meaning of the term extends beyond those waters meeting the traditional tests of navigability.

In a comprehensive review of the legislative history of the Act, as well as other legal precedent interpreting the meaning of this term, the court in *State of Wyoming* cited numerous authorities. The comments of Representative Dingell on the bill (later enacted as the Act) reported from the Conference Committee, are particularly relevant:

Third, the conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense we sometimes see in the laws.

* * * * *

Thus, the new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill. 118 Cong. Rec. H9124-9125 (daily ed. Oct. 4, 1972).

In addition, the court in *State of Wyoming* cited *Natural Resources Defense Council Inc. (N.R.D.C.) v.*

Callaway, 392 F.Supp. 685 (D.D.C. 1975), where the district court ordered the Corps of Engineers to expand its definition of "navigable waters" under the Act. In *N.R.D.C. v. Callaway*, the district court stated:

Congress by defining the term "navigable waters" in Section 502(7) of the * * * [Act] to mean "the waters of the United States, including the territorial seas," asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. * * * [392 F.Supp. at 686.]

While it is beyond the scope of this opinion to trace the meaning of "waters of the United States" to its constitutional roots, it is clear that this interpretation applies to activities of the Bureau of Reclamation, and that under it the meaning of "navigable waters" used in sec. 404 is extremely broad.

Consulting the Corps of Engineers' Permit Regulations discloses a definition of the term "waters of the United States" that is correspondingly broad. Under sec. 323.2(a):

The term "waters of the United States" means: [footnote omitted]

(1) The territorial seas with respect to the discharge of fill material. * * *

(2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;

(3) Tributaries to navigable waters of the United States, including adjacent wetlands (man-made nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition).

(4) Interstate waters and their tributaries, including adjacent wetlands; and

(5) All other waters of the United States not identified in paragraphs (1)-(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." [Footnote below is quotation from original].

The landward limit of jurisdiction in tidal waters, in the absence of adjacent wetlands, shall be the high tide line and the landward limit of jurisdiction an [sic] all other waters, in the absence of adjacent wetlands, shall be the ordinary high watermark.

"In defining the jurisdiction of the FWPCA as the "waters of the United States," Congress, in the legislative history to the Act, specified that the term "be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." The waters listed in paragraphs (a) (1)-(4) fall within this mandate as discharges into those waterbodies may seriously affect water quality, navigation, and other Federal interests; however, it is also recognized that the Federal government would have the right to regulate the waters of the United States identified in paragraph (a) (5) under this broad Congressional mandate to fulfill the objective of the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a)). Paragraph (a) (5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may

not be readily obvious or where the location or size of the waterbody generally may not require regulation through individual or general permits to achieve the objective of the Act. Discharges of dredged or fill material into waters of the United States identified in paragraphs (a) (1)-(4) will generally require individual or general permits unless those discharges occur beyond the headwaters of a river or stream or in natural lakes less than 10 acres in surface area. Discharges into these latter waters and into most of the waters identified in paragraph (a) (5) will be permitted by this regulation, subject to the provisions listed in paragraph 323.4-2(b) unless the District Engineer develops information, on a case-by-case basis, that the concerns for the aquatic environment as expressed in the EPA Guidelines (40 C.F.R. 230) require regulation through an individual or general permit. (See 323.4-4). 33 C.F.R. 323.2(a).

Since this definition employs the term "navigable waters of the United States," which does not have an obvious meaning, further definition is necessary. Under sec. 323.2 (b):

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and the flow of the tide shoreward to the mean high water mark (mean higher high water mark on the Pacific coast) and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR 329 for a more complete definition of this term.)

As can be seen from these definitions, the meaning of the term "waters of the United States" is very complex, and not amenable to a succinct summary interpretation. For

purposes of this opinion it is sufficient to conclude that the meaning of the term extends beyond waters meeting the traditional tests of navigability to those encompassed by the broadest possible Constitutional interpretation, and that when questions arise on specific waters they should be resolved on a case-by-case basis.

III.F. Conclusion to Question No. 3

Thus, a permit under sec. 404 of the Act is required for the discharge of dredged or fill material under the following general circumstances:

a) The "discharge" constitutes any addition of any pollutant, including the placement of fill and the building of any structure or impoundment, to navigable waters from any discernible, confined and discrete conveyance; and

b) The "dredged material" is dredged spoil that is excavated or dredged from waters of the United States; or

c) The "fill material" includes any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody, including any structure which requires rock, sand, dirt, or other material for its construction; and

d) The discharge is made into "waters of the United States," which extend beyond those waters meeting the traditional tests of navigability to those encompassed by

the broadest possible Constitutional interpretation.

IV. THE SEC. 404(r) EXEMPTION TO THE REQUIREMENT FOR A SEC. 404 PERMIT

Question No. 4: What are the conditions for securing the exemption under sec. 404(r) of the Act for projects described in an EIS? Does this exemption apply to the maintenance of existing projects? How does the exemption affect the standards that apply to the discharge of dredged or fill material?

IV.A. The language of Sec. 404(r)

While sec. 301(a) of the Act prohibits the discharge of any pollutant, and sec. 404(a) authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material, sec. 404(r) provides an exemption to these requirements if certain specific conditions are met. Sec. 404(r) states:

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after the date of enactment of this subsection, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 301(a) or 402 of the Act (except for effluent standards or prohibitions under section 307), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental

Policy Act of 1969 and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction. [91 Stat. 1605, 33 U.S.C. § 1344(r).]

IV.B. Specific Conditions for Securing Sec. 404(r) Exemption

Breaking down sec. 404(r) into its constituent parts yields the following seven specific conditions for securing the exemption:

1) The discharge complies with effluent standards or prohibitions established under sec. 307 of the Act;

2) The discharge takes place as part of "the construction of a Federal project";

3) The Federal project is "specifically authorized by Congress," although the date of authorization is irrelevant;

4) Information on the effects of the discharge is included in an EIS prepared for the project pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*;

5) The EIS includes consideration of guidelines developed by the Administrator of the Environmental Protection Agency (EPA) under sec. 404(b)(1) of the Act;

6) The EIS is submitted to Congress before the discharge takes place; and

7) The EIS is submitted to Congress prior to either:

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a) authorization of the project;
or

b) appropriation of funds for the construction of which the discharge is a part.

Each of these conditions is discussed separately below. Since sec. 404(r) is not covered by the Corps of Engineers' Permit Regulations, nor has there been any judicial interpretation, the following opinion is based primarily on the emphasized language in the following quotations from the legislative history of the Act. Although this detailed reference to the legislative history is necessary to support the subsequent conclusions, it is somewhat lengthy and not essential to understanding the opinion. If you are not concerned with the details of the legislative history, it is suggested that you briefly scan the emphasized language and resume reading in sec. IV.D., headed "Analysis of Conditions for Sec. 404(r) Exemption," on page 420 below.

IV.C. Legislative History of Sec. 404(r)

In submitting to the Senate for consideration House Conference Report No. 95-830 on H.R. 3199, the bill which was ultimately enacted, Senator Muskie stated:

New subsection 404(r) provides an exemption from the permit requirement for discharges of dredged and fill materials associated with the construction of certain Federal projects. Only fully Fed-

eral projects which are specifically authorized by the Congress may qualify for this exemption. Federally assisted projects, such as watershed improvement plans under the Soil Conservation Service, do not qualify even if authorized by name. Projects which are authorized by congressional committee resolution and projects which do not belong to the Federal Government but are financed in whole or in part with Federal funds are not eligible for the exemption. *Maintenance of existing Federal projects is not covered by the exemption either.*

A Federal project may be exempted from the requirement for a permit under section 404 or an approved State section 404 permit program only if the Congress had adequate information on the effects of the discharge of dredged or fill material at the time of authorization, or at the time of a *specific appropriation* of funds for the construction involving the discharge. This information must be in the form of an *environmental impact statement which specifically addresses the effects of the discharge of dredged or fill material, providing an evaluation of those effects equivalent to that required under the section 404(b)(1) guidelines.* *It is unlikely that environmental impact statements prepared before the passage of this legislation or promulgation of those guidelines would satisfy this requirement.*

The Congress must have adequate sitting, engineering, and environment information and analysis on each proposed Federal project, as well as modifications recommended by reviewing agencies, in order to review the available alternatives to and potential adverse impacts of the proposed discharges. The Administrator will be expected to see that the section 404(b)(1) guidelines are sufficiently explicit to focus attention on those aspects of Federal project dredge and fill material discharges that could result in environmental degradation. And the Admin-

istrator must assist other agencies by carefully reviewing draft environmental impact statements to assure that the guidelines are being interpreted and implemented properly.

* * * * *

** * * The depth and quality of discussion of the effects of discharges, including consideration of the (b) (1) guidelines are crucial to the operation of new subsection (r). The filing of an impact statement adequately exploring these issues is a condition precedent to the operation of subsection (r). Until and unless adequate impact statements, or amendments to statements, are circulated and filed in accordance with the National Environmental Policy Act and the (b) (1) guidelines, the permit requirements of section 404 which existed before the passage of the presently pending bill will remain in full force and effect as to any given project in question.*

The process of review of environmental impact statements by other agencies should provide the same degree of coordination now provided in the interagency review of permit applications. 123 Cong. Rec. S19,653-54 (daily ed. Dec. 15, 1977) (Italics added.)

Senator Stafford, the conference committee's ranking minority member, stated:

Section 404 is further amended to provide that discharges of dredged or fill material by Federal agencies to construct *Federal projects specifically identified by Congress when authorized* are not subject to the permit requirements under section 404 or under an approved State permit program if the environmental impact statement submitted to Congress includes a complete analysis of the effects of the discharge based on the 404(b) (1) guidelines. The conferees agreed that discharges from any activity conducted with assistance from the Federal Government and *the maintenance of existing Federal projects will remain under the permit program.*

Projects even though fully financed by the Federal Government, which are authorized under continuing authorities or lump sum appropriation shall be subject to 404 permits not withstanding [sic] the issuance by the responsible Federal agency of a programmatic or individual NEPA review document. Only the discharge of dredged or fill material for the construction of a new individual Federal project for which there is an environmental impact statement dealing solely with that project furnished to the authorizing committee prior to the specific authorization of that project by the committee and by Congress shall be exempted from section 404 permits. In order for the exemption to take effect, such environmental impact statement must contain a full and complete analysis of adverse effects and alternatives as required by the 404(b) guidelines.

For the purposes of this act, *Federal projects are those which are entirely planned, financed, and constructed by a Federal agency in every respect.* * * * 123 Cong. Rec. S19,659 (daily ed. Dec. 15, 1977) (Italics added.)

Senator Baker, a member of the conference committee, stated:

[T]he bill contains a *narrow exemption for the construction by Federal agencies of new projects that are specifically identified in the authorization passed by Congress* if Congress is provided with a final environmental statement that includes a detailed analysis of the adverse effects of the project as required by the section 404(b) guidelines. *The purpose of this narrow exemption is not to relieve certain Federal projects from substantive compliance with the Clean Water Act, but rather the intention is to avoid costly delays for Federal construction of environmentally sound projects after they have been authorized by Congress.* 123 Cong. Rec. S19,675 (daily ed., Dec. 15, 1977) (Italics added.)

And Senator Wallop, a member of the conference committee, stated:

Subsection (r) of section 404 will provide a *limited exemption* from Federal and State permit programs for discharges of dredges [*sic*] or fill material to construct *Federal projects specifically identified by Congress when authorized.* * * *

The exemption provided by this subsection applies only to *discharges that are an integral part of constructing a Federal project* which has been reviewed and approved by Congress. *Federal projects include only those conducted by a Federal agency and by such contractors as the agency may employ. The conferees did not intend to exempt other discharges which may be associated generally with constructing Federal projects, but which are ancillary to the specific activity submitted to and approved by Congress.* For such ancillary discharges, the full section 404 review and approval procedures shall be applied by the Corps of Engineers and the administrator unless other exemptions are applicable. The conferees did not intend to exempt federally assisted projects from the section 404 review.

In order to qualify for the exemption, an adequate environmental impact statement on the project must have been submitted to Congress prior to authorization of the project or appropriation of construction funds and, in all cases, prior to the action discharge of dredged or fill material at any particular site. The statement must satisfy the requirements of NEPA and include complete information on the effects of the proposed discharge. Moreover, the guidelines developed by the administrator under section 404(b)(1) must be fully complied with in developing and assessing such information.

Congress must have adequate siting, engineering, and environmental informa-

tion and analysis on each proposed Federal project, as well as modifications recommended by reviewing agencies, in order to review the available alternatives to and potential adverse impacts of the proposed discharges, to weigh those impacts and alternatives against the benefits of the projects. 123 Cong. Rec. S19,677 (daily ed. Dec. 15, 1977) (Italics added.)

Finally, House Conference Report No. 95-830 states:

The Conferees have * * * *limited the exemption* [under section 404(r)] so as to ensure that the Congress will have *full information on the impacts of the discharge of dredged or fill material associated with a project when it determines whether or not to authorize the project or to appropriate funds for its construction.* Only those projects which have received an analysis of the effects of a discharge *equivalent to that provided under the guidelines promulgated under section 404(b)(1) prior to authorization or specific funding* for activities which would result in the discharge of dredge and fill material are exempt. An environmental impact statement addressing the impact of the discharge, with particular reference to the guidelines promulgated pursuant to subsection 404(b)(1), must have been submitted to Congress prior to either the authorization or the appropriation of funds. Thus Congress is to have the benefit of all the necessary information when it makes its decision. It is emphasized that the failure of a project to meet these requirements will result in the project having to obtain a section 404 permit. It would not require a reauthorization or additional appropriation action. H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 104 *reprinted in* [1977] 3 U.S. Code Cong. & Ad. News, 4326, 4479 (Italics added).

*IV.D. Analysis of Conditions for
Securing Sec. 404(r) Exemption*

Based on the preceding legislative history of sec. 404(r), the following conclusions can be drawn concerning the specific conditions required for securing the exemption.

First, the exemption under sec. 404(r) does not apply to the discharge of dredged or fill material containing toxic pollutants. Discharges containing toxic pollutants must comply with standards or prohibitions established under sec. 307 of the Act, 33 U.S.C. § 1317 (Supp. I 1977).

Second, the exemption applies only to discharges which take place as part of the construction of a Federal project. The term "construction" does not include maintenance of existing projects. The project must be fully Federal, including planning, finance and construction, although the use of outside contractors is permissible. Discharges which are ancillary to the specific activity submitted to and approved by the Congress are not included. (For a discussion of sec. 404(f)(1) of the Act, which exempts from the permit requirements of sec. 404 the maintenance of currently serviceable structures, see the discussion of Question No. 5 in sec. V of this opinion, below.)

Third, the project must be specifically authorized by the Congress. It must be specifically identified by the Congress when authorized. Projects authorized by congressional committee resolution do not

qualify, nor do those authorized under continuing authorities or lump sum appropriation.

Fourth, information on the effects of the discharge and alternatives to the project must be included in a legally adequate EIS. The EIS may be either new for the project or a supplement to an existing EIS, but in either case it must specifically address the effects of the discharge. It is doubtful that a program or regional EIS would meet these specific requirements.

Fifth, the EIS which covers the impacts of the discharge must include consideration of the guidelines developed by the Administrator of EPA under sec. 404(b)(1) of the Act. See: EPA Interim Regulations on Discharge of Dredged or Fill Material into Navigable Waters, 30 CFR 230, 40 FR 41291 (Sept. 5, 1975). While the analysis may be "equivalent" to that required under the guidelines, it is unlikely that an EIS prepared prior to promulgation of the guidelines or passage of the Act would satisfy this requirement. Where the Bureau of Reclamation prepares an EIS with the intention of securing the sec. 404(r) exemption, the EIS should explicitly state the Bureau's intention and identify the portions of the document where the effects of the discharge and the alternatives are included, as well as where the sec. 404(b)(1) guidelines of EPA are considered. There is currently under development by the office of Management and Budget and the Council on Environmental Quality

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a Joint Memorandum of Heads of Agencies which will establish procedures for reviewing EIS's before they are submitted to the Congress under sec. 404(r). This Joint Memorandum should clarify many issues concerning the EIS requirements for securing the sec. 404(r) exemption.

Sixth, the EIS must be submitted to Congress before the discharge takes place. In addition, siting and engineering information and analysis, as well as modifications recommended by reviewing agencies, must be submitted to the Congress. Submission of the EIS to the Council on Environmental Quality or EPA, as applicable, is not sufficient to meet this requirement.

Seventh, the EIS must be submitted to the Congress prior to either specific authorization of the project or a specific appropriation of funds for the construction of which the discharge is a part.

Finally, when analyzing a given Bureau of Reclamation project and related EIS for compliance with these conditions, it is important to keep in mind that the purpose of sec. 404(r) is not to exempt any Federal project from compliance with the Act, but to avoid duplication and delay where substantive compliance has been achieved through the EIS process. It is clear from reading the Act and its legislative history that the sec. 404(r) exemption is not meant to

lessen the substantive requirements that apply to the discharge of dredged or fill material, but only to provide an alternative procedure to achieve compliance for a very limited category of Federal projects.

IV. E. Conclusion to Question No. 4

Thus, to secure the exemption under sec. 404(r) of the Act for projects described in an EIS, compliance with the seven specific conditions listed in the discussion in sec. IV.B. and analyzed in sec. IV.D. of this opinion is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.

V. THE SEC. 404(f)(1) EXEMPTION TO THE REQUIREMENT FOR A SEC. 404 PERMIT

Question No. 5: What are the conditions for securing the exemption under sec. 404(f)(1) of the Act for the maintenance of currently serviceable structures? To what extent does this exemption

apply to the discharge of dredged material?

V.A. The Language of Section 404(f)(1)

While sec. 301(a) of the Act prohibits the discharge of any pollutant, and sec. 404(a) authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material, sec. 404(f)(1) provides an exemption to these requirements for, among other things, the maintenance of currently serviceable structures. In the relevant parts, sec. 404(f)(1) states:

Except as provided in [sec. 404(f)(2)], the discharge of dredged or fill material—

* * * * *

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

* * * * *

* * * is not prohibited by or otherwise subject to regulation under this section or section 301(a) or 402 of this Act (except for effluent standards or prohibitions under section 307). [91 Stat. 1600, 33 U.S.C. § 1344(f)(1).]

Sec. 404(f)(2), which limits the exemption of sec. 404(f)(1), states:

Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section. [91 Stat. 1601, 33 U.S.C. § 1344(f)(2).]

V.B. Specific Conditions for Securing Sec. 404(f)(1) Exemption

Breaking down secs. 404(f)(1) and (2) into their constituent parts yields the following four specific conditions for securing the exemption:

1) The discharge complies with effluent standards or prohibitions established under sec. 307 of the Act;

2) The discharge of dredged or fill material takes place for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures;

3) The maintenance is performed on a structure of the type enumerated; and

4) The maintenance does not bring an area of the navigable waters into a new use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced.

Each of these conditions is discussed separately below. Since sec. 404(f)(1) is not covered by the Corps of Engineers' Permit Regulations, nor has there been any judicial interpretation, this opinion is based primarily on the explicit meaning of the words secs. 404(f)(1) and (2) employ, and the following excerpts from the legislative history of the Act.

V.C. Legislative History of Sec. 404(f)(1)

The legislative history of sec. 404(f)(1) is sparse but informative.

The Senate Report on S. 1952, the Senate version of H.R. 3199, states:

[Section 404(f)(1)] * * * exempts from permit requirements the maintenance and emergency reconstruction of existing fills such as highways, bridge abutments, dikes, dams, levees, and other currently serviceable structures. *This does not include maintenance that changes the character, scope, or size of the original fill.* Emergency reconstruction must occur within a reasonable period of time after destruction of the previously serviceable structure to qualify * * * S. Rep. No. 95-370, 95th Cong., 1st Sess. 76 reprinted in [1977] 3 U.S. Code Cong. & Ad. News, 4326, 4401. (Italics added.)

In submitting to the Senate for consideration House Conference Report No. 95-380 on H.R. 3199, the bill which was ultimately enacted, Senator Muskie stated:

New subsection 404(f) provides that Federal permits will not be required for those *narrowly defined activities that cause little or no adverse effects either individually or cumulatively.* While it is understood that *some of these activities may necessarily result in incidental filling and minor harm* to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body. 123 Cong. Rec. S19,654 (daily ed. Dec. 15, 1977). (Italics added.)

And Senator Wallop, a member of the conference committee, stated:

The amendment also excludes from permit requirements, discharges of dredged or fill material in conjunction with the following activities that *will cause little or no adverse effects either individually or cumulatively:*

[This includes] the maintenance and emergency reconstruction of currently serviceable structures such as dikes, levees, dams, and bridge abutments.

* * * * *

A case-by-case permit review would not be required for *narrowly defined* activities that cause little or no adverse effects either individually or cumulatively, including those activities *narrowly defined* in paragraphs (A-F) of subsection (f) of section 404. 123 Cong. Rec. S19,677 (daily ed. Dec. 15, 1977). (Italics added.)

V.D. Analysis of Conditions for Securing Sec. 404(f)(1) Exemption

Based on the preceding legislative history, and the plain meaning of the words the section employs, the following conclusions can be drawn concerning the specific conditions that must be met to secure the sec. 404(f)(1) exemption.

First, as was the case for the exemption under sec. 404(r), the exemption does not apply to the discharge of dredged or fill material containing toxic pollutants. Discharges containing toxic pollutants must comply with standards or prohibitions established under sec. 307 of the Act, 33 U.S.C. § 1317 (1976).

Second, the exemption is explicitly limited to the maintenance of currently serviceable structures. While this includes emergency reconstruction, it does not include new construction, which in appropriate circumstances is exempted only under sec. 404(r). As noted in the above quotation from the Senate Report on S. 1952, to qualify for

the exemption the emergency reconstruction must occur within a reasonable period of time after destruction of the previously serviceable structure. The meaning of "reasonable" in this context would depend upon the nature of the structure and the circumstances involved in its reconstruction. A detailed analysis of what would be "reasonable" is beyond the scope of this opinion, and where uncertainty exists it should be resolved on a case-by-case basis in consultation with the appropriate Corps of Engineers' District Engineer.

Third, the maintenance must be performed on the types of structures enumerated in sec. 404(f) (1), including highways, bridge abutments, dikes, dams and levees. As noted in the Senate Report on S. 1952 these enumerated structures are all "fills," and as noted by Senators Muskie and Wallop the activities to which the exemption applies are "narrowly defined." Thus, the exemption does not apply to the discharge of dredged material incident to maintenance dredging operations—it only applies to the maintenance of fills. This interpretation was corroborated in a personal conversation with the Corps of Engineers' attorney who drafted sec. 404(f) (1). However, since sec. 404(f) (1) specifically provides for the "discharge of dredged * * * material" in connection with the maintenance of currently serviceable structures, it would appear that the discharge of a reasonable amount of dredged material incident to the maintenance of fills

would come within the purview of this exemption. In determining what is "reasonable" in a specific situation, it is important to keep in mind the statement of Senator Muskie, which was reaffirmed by Senator Wallop, that while such "activities may necessarily result in incidental filling and minor harm" the exemption only applies to "narrowly defined activities that cause little or no adverse effects either individually or cumulatively."

Finally, under sec. 404(f) (2), this exemption does not apply to any discharge which bring an area of the navigable waters into a use to which it was not previously subject, where flow or circulation may be impaired or the reach reduced.

V.E. Conclusion to Question No. 5

Thus, to secure the exemption under sec. 404(f) (1) of the Act for the maintenance of currently serviceable structures, compliance with the four specific conditions listed in this discussion in sec. V.B. and analyzed in sec. V.D. is required. The exemption does not apply to the discharge of dredged material incident to maintenance dredging, or to new construction, but only to the maintenance of currently serviceable structures.

Acknowledgment

This memorandum opinion was written by Albert A. Kashinski in the Division of General Law.

LEO KRULITZ,
Solicitor.

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(PRU 10542)

September 5, 1979

ADMINISTRATIVE APPEAL OF
OGLALA SIOUX TRIBE

v.

COMMISSIONER OF INDIAN
AFFAIRS AND RICHARD TALL
(PRU-10542)

7 IBIA 188

Decided September 5, 1979

Appeal from decision of Acting Deputy Commissioner of Indian Affairs upholding Area Director's approval of Indian's application for fee patent title to certain trust lands on the Pine Ridge Indian Reservation.

Affirmed.

1. Act of March 2, 1889—Indian
Lands: Allotments: Generally

Assuming, in the light most favorable to appellant, that the allotments at issue were subject to the final *proviso* of sec. 9 of the Act of Mar. 2, 1889, 25 Stat. 888, 891, we find no language in this or other sections of the Act evidencing an intention on the part of Congress that allotments—to be valid—required approval by the Oglala Sioux Tribe.

2. Act of June 30, 1834—Indian
Lands: Allotments: Generally

Appellant's contention that under sec. 22 of the Act of June 30, 1834, 4 Stat. 729, 733 (25 U.S.C. § 194 (1976)), the burden of proof cannot be assigned to the tribe is without merit. The issue framed by appellant does not align "Indians" against "whites." The primary relief sought by the tribe is the cancellation of trust patents which can only be held by Indians.

3. Indian Lands: Allotments: Generally

The issuance of a trust patent for an Indian allotment carries with it a presumption of proper performance as well as the implied finding of every fact made a prerequisite to the patent's issue.

4. Indian Tribes: Constitution, By-laws and Ordinances

The Department is not bound by a tribal ordinance regulating trust property where such ordinance violates provisions of the tribal constitution and bylaws which the Secretary has sworn to uphold.

5. Indian Lands: Allotments: Generally

In addition to contravening rights bestowed by the tribe's own constitution, appellant's position that members of the tribe cannot obtain fee patents to individually owned trust land violates express guarantees contained in the General Allotment Act and the Indian Reorganization Act, *as amended*.

6. Indian Lands: Patent in Fee: Generally

Under regulations in effect before Apr. 24, 1973, issuance of a fee patent to a competent Indian applicant was considered by the Department to be mandatory. On the foregoing date, however, 25 CFR Part 121 was revised to reflect the authority derived from the authorizing acts and to allow the exercise of discretion in the issuance of fee patents.

APPEARANCES: Mario Gonzale, Esq., for the Oglala Sioux Tribe, appellant; Richard Tall, *pro se*, respondent.

OPINION BY CHIEF
ADMINISTRATIVE JUDGE
HORTON

INTERIOR BOARD OF
INDIAN APPEALS

The Oglala Sioux Tribe of the Pine Ridge Indian Reservation (appellant) has appealed from a decision of the Acting Deputy Commissioner of Indian Affairs, Martin E. Seneca, Jr., entered Oct. 27, 1978, wherein Mr. Seneca upheld a determination by Area Director Harley Zephier, Aberdeen Area Office, Bureau of Indian Affairs, approving the application of Richard Tall (respondent) for patents in fee to three trust allotments comprising 698.80 acres of land on the Pine Ridge Reservation.

Respondent is a member of the Oglala Sioux Tribe. He is the beneficial owner of the following Oglala Sioux allotments: OS-6433, OS-2631, and OS-6795—legal title to which is held by the United States in trust for the Indian owner. These allotments were issued under authority of the Act of Mar. 2, 1889 (25 Stat. 888), commonly known as the Sioux Agreement of 1889. On Mar. 15, 1976, respondent applied to the Bureau of Indian Affairs to have the foregoing allotments patented to him in fee, in accordance with the provisions of sec. 11 of the Act of Mar. 2, 1889, *supra*, which incorporates the rights and privileges conferred upon allotment owners under the General Allotment Act of 1887, 24 Stat. 388, *as amended*, 25 U.S.C. §§ 331-358 (1976); the Act

of May 14, 1948, 62 Stat. 236, 25 U.S.C. § 483 (1976); and Departmental regulations found in 25 CFR Part 121.

On May 21, 1976, the Pine Ridge Agency informed the Executive Committee of the Oglala Sioux Tribe in writing of the applications made by respondent and inquired as to the Committee's position regarding them. This procedure was apparently followed in conjunction with the provisions of 25 CFR 121.2 which provides in part as follows:

Action on any application, which if approved would remove Indian land from restricted or trust status, may be withheld, if the Secretary determines that such removal would adversely affect the best interest of other Indians, or the tribes, until the other Indians or the tribes so affected have had a reasonable opportunity to acquire the land from the applicant.

Respondent apparently holds OS-6795 (the May Patton allotment) subject to a condition that if the land is offered for sale before Feb. 7, 1983, the Oglala Sioux Tribe shall be provided notice thereof and an opportunity to purchase the land within 60 days from the date of notice. BIA Title Status Report, OS-6795, p. 3. Reference to this feature of OS-6795 was cited by the Agency in its May 21, 1976, memorandum to the tribe.

On July 26, 1976, the Administrative Assistant to the President of the Oglala Sioux Tribe inquired of the Pine Ridge Agency as to the purchase price paid by respondent for the three allotments in question. The administrative record indicates

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that the requested information was furnished the tribe on Aug. 10, 1976.

By letter dated Feb. 28, 1977, respondent requested the Superintendent of the Pine Ridge Agency to inform him of the status of his fee patent applications. On Mar. 23, 1977, the Agency Superintendent, Anthony Whirlwind Horse, issued a written decision denying respondent's applications. In support of this action the Superintendent stated:

In line with our policy in such matters, we have referred your applications for unrestricted title to the Oglala Sioux Tribe by memorandum dated May 21, 1976. We have received no word on any action they may have taken thereon. However, the Tribal Council has enacted an ordinance prohibiting the issuance of fee patents, or otherwise allowing trust lands to become alienated by sale to non Indians.

On Apr. 8, 1977, respondent submitted an appeal to the Area Director, Bureau of Indian Affairs, Aberdeen Area Office, in accordance with 25 CFR Part 2, seeking reversal of the Superintendent's determination. On May 31, 1978, the Area Director issued a decision reversing the Superintendent. In effect, the Area Director's decision concluded that the tribal ordinance relied upon by the Superintendent in denying the applications at issue (Tribal Ordinance 76-05) was contrary to Article X of the Constitution and By-laws of the Oglala Sioux Tribe as well as Federal law. The Area Director also ruled that the Oglala

Sioux Tribe could appeal his decision as a party adversely affected thereby.

The Oglala Sioux Tribe, through counsel, filed an appeal from the Area Director's decision on June 30, 1978. The Acting Deputy Commissioner of Indian Affairs affirmed the Area Director's decision on Oct. 27, 1978. An appeal was filed with the Board of Indian Appeals from the decision of the Acting Deputy Commissioner of Indian Affairs on Jan. 8, 1979. Appellant maintains the following. Foremost, the tribe alleges that the lands in question are the property of the Oglala Sioux Tribe. In support of this contention appellant argues that allotments issued under authority of the Sioux Agreement of 1889 are null and void because there was never an election by a majority of the adult members of the tribe approving of the allotments. That such an election was required for allotments to become valid is said by appellant to be mandated by sec. 9 of the Act which states:

Sec. 9. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which

each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided, That if any one entitled to an allotment shall fail to make a selection within five years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner: Provided, That these sections as to the allotments shall not be compulsory without the consent of the majority of the adult members of the tribe, except that the allotments shall be made as provided for the orphans.* [Italics supplied.]

Act of Mar. 2, 1889, 25 Stat. 891.

Second, the tribe contends it was error for the Bureau not to uphold the validity of Tribal Ordinance 76-05, the tribal enactment from which the Pine Ridge Superintendent determined that the patents in fee sought by respondent in this case could not be granted.¹

¹ Tribal Ordinance 76-05, adopted by the tribal council on May 11, 1976, provides as follows:

"WHEREAS Article IV, Section 1(m) of the Constitution of the Oglala Sioux Tribe empowers the Tribal Council to protect and preserve the property and natural resources of the tribe and to regulate the use and disposition of property upon the reservation, and

"WHEREAS Article IV, Section 1(n) of the Constitution of the Oglala Sioux Tribe empowers the Tribal Council to protect the general welfare of the tribe, and

"WHEREAS the Oglala Sioux Tribal Council finds that the transfer of land on the Pine Ridge Indian Reservation from ownership by members of the Oglala Sioux Tribe to ownership by nonmembers has been detrimental to the Tribal economy and destructive to the well-being of the residents of the Reservation, and

"WHEREAS the Council further finds that it would be in the best interest of the Tribe

Third, appellant submits that the Bureau failed to obtain a proper showing from respondent which

for land available for purchase to be made available to members who now own little or no land, and

"WHEREAS the Tribal Council therefore deems it to be beneficial to the general welfare of the Oglala Sioux Tribe that the sale of trust land be regulated,

"NOW THEREFORE BE IT ORDAINED that the Oglala Sioux Tribal Council hereby adopt the following:

"Individual Trust Land Acquisition Ordinance

"Section 1. No trust land located within the exterior boundaries of the Pine Ridge Indian Reservation may be sold except to the Oglala Sioux Tribe or with the approval of the Oglala Sioux Tribe in accordance with the provisions of this Ordinance.

"Section 2. Any member who wishes to sell trust land on the Pine Ridge Indian Reservation and any member wishing to buy such land shall, before submitting their application to the Bureau of Indian Affairs, apply to the Executive Committee for approval of the transaction.

"Section 3. The Executive Committee shall deny approval of a sale transaction unless it finds that the purchaser

(a) is at least 18 years of age; and

(b) does not have land holdings which if added to the land to be purchased would result in the ownership by the purchaser of more than 1,280 acres:

(c) has not previously sold land which was once owned by him in trust to non-Indians, either by supervised sale or after obtaining a fee patent;

(d) agrees not to sell the land at any time to anyone other than the Oglala Sioux Tribe or a member thereof.

"Section 4. The Executive Committee may disapprove any applications which meet the standards of Section 3, if it finds that the transaction would not be in the best interest of the Tribe. In such case the Executive Committee shall set forth the reasons for its decision.

"Section 5. Any applicant who believes that the factual findings of the Executive Committee under Section 3 or the decision of the Executive Committee under Section 4 are wrong, may appeal the determination of the Executive Committee to the Tribal Council within thirty days from the date on which the applicant has been notified of the decision of the Executive Committee.

"Section 6. No sales of trust land by members of the Oglala Sioux Tribe to non-members shall be approved."

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would justify awarding of fee patents to the subject lands.

Respondent, appearing *pro se*, submitted a reply brief in this matter on Mar. 29, 1979. Although entitled to do so under 43 CFR 4.359(a) and the notice of docketing issued by the Board on Jan. 23, 1979, the Bureau did not submit a timely brief in this controversy.²

Discussion, Findings and Conclusions

For the reasons set forth below, the Board affirms the decision of the Acting Deputy Commissioner of Indian Affairs approving Richard Tall's application for patents in fee.

With respect to appellant's claim that respondent's allotments are in fact the property of the Oglala Sioux Tribe,³ we find as follows. First, some meaning must be given to the tribal consent language found in the final *proviso* of sec. 9 of the Sioux Agreement of 1889. To our knowledge, this language has not

been judicially construed. Assuming, in the light most favorable to appellant, that this *proviso* was made applicable to all allotments described in sec. 9 (except allotments to orphans) and not simply to allotments selected for but not by the Indian allottee (a procedure described in the first *proviso* of sec. 9), Congress may merely have been stating that no Indian could be compelled to accept any allotment as selected without tribal consent. However, we believe the most reasonable interpretation is that the final *proviso* of sec. 9 was intended to apply to the limited class of allotments described in the first *proviso* of sec. 9, viz., allotments selected for Indians entitled thereto who failed to personally make a selection within time limits prescribed by the Act.

[1] Further, even if the allotments at issue in this case were subject to the final *proviso* of sec. 9, we still find no language in this or other secs. of the Act of Mar. 2, 1889, evidencing an intention on the part of Congress that allotments—to be valid—required approval by the tribe.

Based on a complete reading of the Act, we therefore hold that under the tribal consent provision of sec. 9 an Indian who failed to timely select an allotment in accordance with the Act could not be *required* to accept an allotment selected on his or her behalf unless a majority of the adult members of

² On Aug. 14, 1979, comments and materials regarding this appeal were received from the Acting Director, Aberdeen Area Office. In addition to its untimeliness, a copy of the foregoing was not served upon the other parties as required by 43 CFR 4.358-4.359. Pursuant to the provisions of 43 CFR 4.24(a)(4), the Board has elected to place no reliance on the late papers submitted by the Acting Area Director in reaching its decision in this case.

³ Appellant's position is that all allotments undertaken under authority of the Act of Mar. 2, 1889, are null and void except those made to orphans. Appellant's Brief filed Mar. 6, 1979, at 4.

the tribe decided that such selection should stand.⁴ Thus, the rights secured by the final *proviso* of sec. 9 are personal to the allottee, not the tribe.

The foregoing is in keeping with the judicial repudiation of mandatory allotment processes. In *United States v. Arenas*, 158 F.2d 730 (9th Cir. 1946), *rehearing denied*, Jan. 14, 1947, *cert. denied*, 331 U.S. 842, the court said:

[A]ny statute authorizing the Secretary to force land in severalty upon the Indians should be strictly construed. Such legislation is in derogation of the general principles of law, which do not favor compulsory ownership of land—especially by persons in a restricted civil status, 158 F.2d 752.

The Supreme Court has routinely addressed allotment issues on the Pine Ridge Reservation without questioning the validity of the original allotments. *Egan v. McDonald*, 246 U.S. 227 (1918); *United States v. Nice*, 241 U.S. 591 (1916). In *Reynolds v. United States*, 174 F. 212 (8th Cir. 1909), the Appeals Court summarized the steps incidental to issuance of a trust patent under the Act of Mar. 2, 1889:

The act providing for the allotment in severalty of lands within the reservation (Act March 2, 1889, c. 405, 25 Stat. 888) prescribes definitely (section 8) the number of acres each qualified claimant is entitled to, and provides (section 9) that all allotments shall be "selected" by the

Indians, heads of families "selecting" for their minor children, and that the agents shall "select" for each orphan child. The making of the allotments is by special agents (section 10), whose duty it is to certify them in duplicate to the Commissioner of Indian Affairs, who in turn transmits one copy to the Secretary of the Interior. When the Secretary approves the allotments, he (section 11) causes patents to be issued in the names of the allottees.

174 F. 214.

Notably absent from the above summary is any indication that tribal consent was required for an allotment to take place.

Appellant has offered no legal authority or factual basis for its claim that tribal consent was necessary for the consummation of allotments on the Pine Ridge Reservation. Instead, appellant argues that the Bureau bears the burden of proving that the allotments were legal.

It is no doubt impossible for the Bureau to come forward with tangible evidence that the subject allotments were approved by tribal vote. Appellant submits the Bureau must do so (Appellant's Br. at 5). As previously stated, tribal consent regarding allotments under the Sioux Agreement seems only to have been required when an Indian allottee objected to an allotment selection made for but not by the Indian. Here, there is nothing in the administrative record to suggest that respondent's trust lands were allotted without the consent of the allottees.

[2] Appellant's contention that under the Act of June 30, 1834, 4

⁴ Of. sec. 2 of the General Allotment Act, 25 U.S.C. § 332 (1976), which provides for the selection of allotments for Indians who fail to select allotments on their own. The Supreme Court has upheld such allotments effected under other statutes. *United States v. Wildcat*, 244 U.S. 111 (1917).

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Stat. 733, 25 U.S.C. § 194 (1976),⁵ the burden of proof in this case cannot be assigned to the tribe is without merit. The issue framed by appellant, that the subject allotments are the property of the Oglala Sioux Tribe, does not align "Indians" against "whites." The primary relief sought by the tribe is the cancellation of trust patents which can only be held by Indians. *Cf. Wilson v. Omaha Indian Tribe*, 47 U.S.L.W. 4758 (decided June 20, 1979).

[3] The issuance of a trust patent for an Indian allotment carries with it a presumption of proper performance as well as the implied finding of every fact made a prerequisite to the patent's issue. *Placid Oil Co., IA-153* (May 27, 1955). Accordingly, the Bureau correctly held in this case that the burden was on the tribe to prove that the trust patents at issue were not lawful. We conclude that the tribe has not met this burden.

Appellant's second contention is that Tribal Ordinance 76-05 prohibits trust patents from being converted to patents in fee and that the provisions thereof are binding on the Secretary.

On its face Tribal Ordinance 76-05 is primarily directed at curbing

the sale of trust land to nonmembers of the tribe. Although the ordinance in fact says nothing about members of the tribe obtaining fee patents to individually owned trust land, appellant submits that the tribe ascribes such a purpose to the ordinance.⁶

Tribal Ordinance 76-05 was enacted by the tribal council under authority of Article IV, Section 1(m) of the Tribal Constitution and Bylaws of the Oglala Sioux Tribe.⁷ Appellant argues that enactments of the tribal council under authority of its constitution are binding on the Department, noting that former Secretary of the Interior Harold L. Ickes in approving the constitution, stated: "All officers and employees of the Interior Department are ordered to abide by the provisions of the said constitution and bylaws." Constitution and Bylaws of the Oglala Sioux Tribe at 12.

[4] We reject appellant's argument that because the Department is committed to upholding the provisions of the tribe's constitution and bylaws it is also bound by whatever ordinances the tribe adopts

⁵ Notice of appeal of Area Director's Decision, filed June 30, 1978, at 3.

⁷ The Oglala Sioux Tribe, which accepted the provisions of the Indian Reorganization Act (the IRA) (25 U.S.C. §§ 461-486 (1976)), adopted its constitution and bylaws on Jan. 15, 1936, pursuant to 25 U.S.C. § 476 (1976). Article IV, Sec. 1(m) of the tribal constitution provides in part that the tribal council shall have the power "to regulate * * * the use and disposition of property upon the reservation * * *."

⁵ This statute provides:

"[I]n all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

regulating trust property on the reservation. Under the circumstances of this case, we hold that Tribal Ordinance 76-05, as interpreted by the tribe, violates Article X, Sec. 1 of the tribal constitution and bylaws. For this reason, if no other, the Secretary is precluded from abiding by the ordinance.⁸

[5] In addition to contravening rights bestowed by the tribe's own constitution, appellant's position that members of the tribe cannot obtain fee patents to individually owned trust land violates express guarantees contained in the General Allotment Act and the Indian Reorganization Act, *as amended*. See 25 U.S.C. §§ 349 and 483.⁹

Appellant refers to *Conroy v. Conroy*, 575 F. 2d 175 (8th Cir. 1978), as authority for the proposition that the Oglala Sioux Tribe

has *in personam* jurisdiction over its members, including the authority to prohibit the issuance of fee patents. The holding in *Conroy* was that it was a proper exercise of tribal authority for the tribal court of the Oglala Sioux Tribe to order a division of trust property in a divorce proceeding between two members of the tribe. In referring to the Federal district court opinion which it sustained, the Appeals Court stated:

It is to be noted that the above decree does not purport, in and of itself, to order any conveyance of land, but rather to order an application to the Secretary to be made. Nor does it by its terms, or reasonable construction thereof, purport to affect the title which the United States, as trustee, holds in the real property. [Footnote omitted.]

575 F. 2d 180.

So qualified, the *Conroy* decision does not in any manner sanction absolute tribal regulation of trust property.

⁸ Article X, Sec. 1 of the tribal constitution and bylaws states as follows:

"Section 1. Allotted lands. Allotted lands including heirship lands, within the Pine Ridge Reservation, shall continue to be held as heretofore by their present owners. It is recognized that under existing law such lands may be inherited by the heirs of the present owner, whether or not they are members of the Oglala Sioux Tribe. Likewise it is recognized that under existing law the Secretary of the Interior may, at his discretion, remove restrictions upon such land, upon application by the Indian owner, whereupon the land will become subject to State taxes and may be mortgaged or sold. The right of the individual Indian to hold or to part with his land, as under existing law, shall not be abrogated by anything contained in this constitution, but the owner of restricted land may, with the approval of the Secretary of the Interior, voluntarily convey his land to the Oglala Sioux Tribe either in exchange for a money payment or in exchange for an assignment covering the same land or other land, as hereinafter provided."

⁹ 25 U.S.C. § 349 (1976) provides in pertinent part:

"[T]he Secretary of the Interior may, in his discretion, and he is so authorized, when-

ever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, * * *."

25 U.S.C. § 483 (1976) provides in pertinent part:

"The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee * * * with respect to lands or interests in lands held by individual Indians under the provisions of [the IRA and the Oklahoma Welfare Act]."

The Department has held that the authority of the Secretary under 25 U.S.C. § 483 to issue patents in fee is not limited to lands acquired for individual Indians pursuant to the IRA but extends to all trust lands held by individual Indians whose tribe has accepted the IRA. *Solicitor's Opinion*, M-36002 (June 7, 1950).

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Finally, and alternatively, appellant submits that the Bureau has failed to adduce the proper findings in approving respondent's fee patent applications.

Felix Cohen noted in his *Handbook of Federal Indian Law* at p. 108 that "[p]erhaps the most important power vested in administrative officials with respect to allotted land is the power to pass upon the alienation of such lands." We agree that this authority must be carefully exercised.¹⁰

The fundamental question before us is whether the Secretary may deny a fee patent to an Indian applicant possessed of trust land when the Indian has been adjudged competent under the Department's regulations. Here, no one questions that Richard Tall, who has previously received patents in fee to former trust lands, satisfies the competency requirements set forth in 25 CFR 121.1(e).¹¹ That the question presented is not easily re-

solved is evident from the fact that Bureau policy on this matter has changed frequently. In addition, there is a lack of judicial guidance on the point.

[6] Present regulations of the Department which implement the fee patent provisions of 25 U.S.C. §§ 349, 372, and 483, among other acts, are contained in 25 CFR Part 121. In addition to the Secretary's authority to withhold action on fee patent applications as described in sec. 121.2, previously discussed, the regulation pertinent to this case is 25 CFR 121.5. This regulation provides in relevant part as follows:

Sec. 121.5. Issuance of patent in fee.

(a) An application may be approved and fee patent issued if the Secretary, in his discretion, determines that the applicant is competent. When the patent in fee is delivered, an inventory of the estate covered thereby shall be given to the patentee. (Acts of Feb. 8, 1887 (24 Stat. 388), as amended (25 U.S.C. 349); June 25, 1910 (36 Stat. 855), as amended (25 U.S.C. 372); and May 14, 1948 (62 Stat. 236; 25 U.S.C. 483), and other authorizing acts).

(b) If an application is denied, the applicant shall be notified in writing, given the reasons therefor and advised of his right to appeal pursuant to the provisions of Part 2 of this chapter.

There is no ambiguity in the above language. The regulation plainly conveys that an application may be approved by the Secretary if an Indian applicant is found competent. Further, an Indian whose application is denied is afforded a

¹⁰ In the recently published text. *Federal Indian Law*, by Getches, Rosenfelt, and Wilkinson (1979), the authors observe: "The ability to convey allotments free of trust has continued the erosive effect of the act [General Allotment Act] on the Indian land base long after Congress halted the issuance of new allotments." At 561.

¹¹ The competency standards of 25 CFR 121.1(e) were derived from the Act of Aug. 11, 1955 (69 Stat. 666), which, in turn, appears to be founded upon the judicially established test for competency set forth in *United States v. Debell*, 227 F. 760 (8th Cir. 1915). The *Debell* standard was reviewed in *Miller v. United States*, 57 F. 2d 987 (10th Cir. 1932), wherein the court concluded that it was a standard "few white men would measure up to."

right to appeal therefrom pursuant to 25 CFR Part 2.

Any doubt about the purpose or effect of 25 CFR 121.5 is eliminated by reference to the official statement concerning this rule when it was published in proposed form. On Apr. 18, 1972, former Commissioner of Indian Affairs, Louis R. Bruce, stated in the *Federal Register*:

Under the present regulations if an applicant is competent, the issuance of a fee patent is mandatory. This revision [25 CFR 121.5(a)] would reflect the authority derived from the authorizing acts and allow the exercise of discretion in the issuance of fee patents as it may now be exercised in the issuance of orders removing restrictions and certificates of competency.

See 37 FR 8384.

The present provisions of 25 CFR 121.5 became effective on Apr. 24, 1973. See 38 FR 10080. In the Administrative Appeal of *Frances M. Shively Kevern*, 2 IBIA 123, 80 I.D. 804 (1973), a case where this Board directly confronted the issue of an Indian applicant's right to a fee patent, the controlling regulations in effect were those rescinded by Commissioner Bruce through the action noted above. Since the Department's regulations are binding on the Boards of Appeal, Office of Hearings and Appeals, in adjudicating disputes (see *Donald G. Jordan*, 35 IBLA 290 (1978)), it was held in *Kevern*, *supra*, that the Bureau was required to issue a fee patent to the Indian applicant whose competency had been established. (The *Administrative Ap-*

peal of Ethel H. Not Afraid v. Area Director, Billings, et al., 3 IBIA 235 (1975), a decision sustaining the denial of an allottee's application for issuance of fee patent as a discretionary act by the Director, distinguished the holding in *Kevern*, pointing out that *Kevern* was decided prior to the Apr. 24, 1973, amendment of 25 CFR 121.5(a).)

That specific grounds are set forth in 25 CFR 121.2 concerning when the Secretary may withhold action on an application for fee patent title (*i.e.*, upon a showing that approval thereof would adversely affect other Indians or tribes) may not be construed as a sign that the Secretary does not contemplate that fee patent title can be denied to competent Indian applicants. As previously shown, 25 CFR 121.5(a) was intentionally changed in 1973 to make it clear that the Secretary has authority to deny fee patents to competent Indian applicants. In short, the "withholding" power established by sec. 121.2 merely furnishes the Secretary with a third alternative to the immediate approval or disapproval of a valid application.¹²

¹² Based on the Board's informational review of a recent Bureau decision involving the same question before us, there is some question whether the BIA presently agrees with this interpretation of its regulations. As previously explained, however, the meaning of the regulations is not subject to debate. And, an agency cannot, consistent with the Administrative Procedure Act, 5 U.S.C. § 553, ignore its own rules and embark on a new course informally. *Boston Edison Co. v. Federal Power Comm'n*, 557 F. 2d 845 (D.C. Cir. 1977).

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Although current regulations clearly authorize the Secretary to deny fee patent applications, they are silent regarding the grounds upon which a competent applicant for fee patent title can have his or her application denied. In the absence of complete rules governing when a fee patent application may appropriately be denied, we hold that the considerations which permit the Secretary to withhold action on an application would, in certain circumstances, legally support a denial of an application. At various times it has been the active policy of the Department to deny fee patent applications when approval thereof would adversely affect the consolidation of Indian lands. As stated by former Acting Solicitor William J. Burke in a Solicitor's Opinion, rendered Feb. 15, 1954 (61 I.D. 298, 302):

Indeed, there are other factors than competency that may legitimately be considered, and have been considered, by the Secretary in deciding whether to issue a patent in fee. Thus, it has been established policy to consider whether the issuance of the patent would adversely affect the consolidation of Indian lands.¹³

¹³ Support for use of this standard is found, among other places, in the Indian Reorganization Act. One of the provisions of this Act, which was enacted to curtail the allotment system and bolster tribal governments, was the indefinite extension of the trust period for individual allotments. 25 U.S.C. § 462. In addition, the 1948 amendment to the IRA expressly vests the Secretary with discretion in acting on requests for fee patent title. 25 U.S.C. § 483. (For an analysis of why 25

Any conversion of trust land to fee status will of course result in a diminution of Federally protected Indian land. The extent to which any proposed conversion would result in such adverse effects on other Indians or tribes that the Secretary should not approve it is a question which can only be addressed on a case-by-case basis.

Another standard is found in *Ex Parte Pero*, 99 F. 2d 28 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939). There, the Appeals Court stated:

[T]he issuance of a patent in fee simple by the Secretary is not mandatory upon his being satisfied that a trust allottee is competent and capable of managing his own affairs.

* * * * *

[U]nder Section 349 [25 U.S.C.] it is obvious that the Secretary of the Interior patent in fee simple to a trust allottee. A selection filed by the State of Alaska ought to be satisfied not only that the allottee is competent and capable of managing his or her affairs, but also that it would be to the best interest of the allottee for the allottee to become emancipated from the exclusive jurisdiction of the United States and become subject to the laws of the state in which he resides.

99 F. 2d 34-35.

We agree that it is a valid consideration for the Secretary to determine whether issuance of a fee patent is in the best interest of the

U.S.C. § 372 need not be construed as mandating the issuance of fee patent title upon a Secretarial determination of competency, see Acting Solicitor Burke's Opinion, *supra* at 61 I.D. 301-302.

Indian applicant. To issue a fee patent under the Secretary's discretionary authority when such action is not in the best interest of the Indian applicant would be wholly inconsistent with the Department's fiduciary obligations as trustee.

Implicit in the above standard is recognition that the owner of a trust patent enjoys only those property rights specifically conferred by Congress. We summarize these to be a right to present use and occupancy of the land, protected by Federal supervision, and a future right to fee patent title if and when the trust status of the land is lifted.

Unfortunately, factual shortcomings in the administrative record before us render it exceedingly difficult to evaluate the merits of the Bureau's action in this case. The only reason given by Richard Tall for wanting fee title to his trust lands is that such title will improve his ranching operation. He does not state how. Mr. Tall does make it clear that he has no desire or intention to sell his lands to the tribe.

On the other hand, the record shows that the tribe was given ample opportunity to voice objection to the subject applications, filed over 3 years ago, prior to their approval by the Area Director. No objections or offers to purchase respondent's trust lands were submitted. Nor are there any objections of record from individual Indians claiming that the applications should, for any reason, be denied.

But for certain equitable and other considerations, this is the na-

ture of case which should possibly be referred for an evidentiary hearing pursuant to 43 CFR 4.361(a), although no party has urged the necessity of a hearing. Richard Tall has been waiting well over 3 years for a final decision from the Department on his applications. He is now 60 years old and is surely entitled to a final decision at once if possible. Further, in the absence of published guidelines or rules concerning when a fee patent application may appropriately be approved or disapproved, the value of a hearing in this case is somewhat diminished. Lastly, while legal questions have arisen in the context of this appeal, the Secretary's power to approve fee patent applications is, pursuant to statute and rulemaking, discretionary. Exercise of this discretion has been delegated to Bureau officials, not the Office of Hearings and Appeals. Except upon special delegation from the Secretary, the Board is not authorized to review discretionary decisionmaking of the BIA. *See* 43 CFR 4.1(b)(2); 4.351; 4.353; 4.361(b); and 25 CFR 2.19.¹⁴ Under the circumstances, we shall dispose of this matter.

Based on a complete review of the administrative record, including the arguments of the parties, and on the Board's understanding of the applicable law and regulations, we hold that it was not error for the

¹⁴ The BIA did correctly observe that this case involved legal questions appealable to the Board by reference to such appeal rights in the decision of the Acting Deputy Commissioner.

Bureau of Indian Affairs to approve Richard Tall's fee patent applications. Such holding is based, *inter alia*, on a finding that such action is adverse neither to Mr. Tall nor to the Oglala Sioux Tribe, as evidenced by its response or lack thereof to the subject applications.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals under 43 CFR 4.1, the decision of Acting Deputy Commissioner of Indian Affairs, Martin E. Seneca, Jr., dated Oct. 27, 1978, is affirmed. This decision is final for the Department.

WM. PHILIP HORTON,
Chief Administrative Judge.

WE CONCUR:

FRANK ARNESS,
Administrative Judge.

MITCHELL J. SABAGH,
Administrative Judge.

DEAN TRUCKING CO., INC.

1 IBSMA 229

Decided *September 11, 1979*

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM) from the amended decision of Administrative Law Judge Tom M. Allen, dated April 12, 1979, vacating three notices of violation issued by OSM pursuant to the Surface Mining Control and Reclamation Act of 1977 (Docket Nos. CH 8-12-R and CH 9-4-R).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Valley and Head-of-Hollow Fills

The fact that an operator may have begun constructing a fill which obstructed, interrupted, or encroached upon a natural drainage channel or natural stream channel prior to May 3, 1978, may not excuse the operator from complying with federal requirements for a valley fill when he subsequently continues construction of the valley fill.

2. Administrative Procedure: Burden of Proof—Rules of Practice: Appeals: Burden of Proof—Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

In review proceedings of notices of violation and cessation orders, the burden of going forward to establish a *prima facie* case rests with OSM and the ultimate burden of persuasion rests with the applicant for review.

APPEARANCES: Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia; Shelley D. Hayes, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for appellant, the Office of Surface Mining Reclamation and Enforcement; Carl E. McAfee, Esq., Norton, Virginia, for appellee, Dean Trucking Co., Inc.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This case was originally before the Board as IBSMA 79-4. On

Mar. 23, 1979, in *Dean Trucking Co., Inc.*, 1 IBSMA 105, 86 I.D. 201 (1979), the Board remanded the case to the Hearings Division to allow the Administrative Law Judge (ALJ) to make adequate findings of fact.

On Apr. 12, 1979, the ALJ issued his "Amended Final Decision." In it he vacated that part of his Nov. 28, 1978, decision entitled "Discussion, Findings of Fact and Conclusions of Law" and substituted an amended decision in which he reaffirmed his holding that violations Nos. 2 and 3 of Notice of Violation No. 78-I-18-3, relating to failure to have perimeter markers and a sedimentation pond, were properly issued. In addition, he vacated violation No. 1 of Notice of Violation No. 78-I-18-3, Notice of Violation No. 78-I-15-3, and Notice of Violation No. 78-I-15-6, all pertaining to the fill created by Dean.

On May 14, 1979, OSM filed a timely notice of appeal seeking review of that part of the ALJ's decision which vacated the violations relating to the fill. On June 13, 1979, OSM filed a brief. Dean filed a brief on July 30, 1979; this brief was 27 days late and has not been accepted by the Board. *See* 43 CFR 4.1273(d).

The factual and procedural background surrounding the notices of violation involved in this case were set forth in the previous Board decision and need not be repeated.

As discussed below, the ALJ held in his "Amended Final Decision" that "the preponderance of the evidence shows and I so hold

that the area in question was not a valley or head-of-hollow on Aug. 2, 1977, May 3, 1978, or at any time after May 3, 1978, as defined in 30 CFR 710.5." (ALJ's decision at 8). We find this holding to be in error. Therefore, we reverse.

Discussion

OSM cited Dean for violating 30 CFR 715.15(b) relating to disposal of spoil in valley or head-of-hollow fills.¹ At the hearing before the ALJ Dean contended that it was not disposing of fill in a valley.

"Valley" is not defined in the Act or in the interim regulations. "Valley fill" and "head-of-hollow fill" are defined for purposes of this appeal in 30 CFR 710.5 (42 FR 62679 (Dec. 13, 1977)) as follows:²

¹That regulation, *inter alia*, was the subject of a consolidated lawsuit challenging the interim regulations. On Aug. 24, 1978, Judge Flannery left 30 CFR 715.15(b) "in force, but remand[ed] the regulations to the Secretary for reconsideration in light of the March 1978 report [an update of Skelly & Loy, Environmental Assessment of Surface Mining Methods, Head-of-Hollow Fill and Mountain Removal, Interim Report (1977)]." *In Re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1311 (D.D.C. 1978). On May 25, 1979, OSM published final interim regulations establishing design criteria for head-of-hollow and valley fills to be effective June 25, 1979. 44 FR 30610.

²The May 25, 1979, regulations (44 FR 30610, 30628) revised the definitions of head-of-hollow fill and valley fill in 30 CFR 710.5 to read as follows:

"Head-of-hollow fill means a fill structure consisting of any material, other than coal processing waste and organic material, placed in the uppermost reaches of a hollow where side slopes of the fill measured at the steepest point are greater than [sic] 20° or the profile of the hollow from the toe of the fill to the top of fill is greater than 10°. In fills with less than 250.00 cubic yards of material, associated with contour mining, the top surface of the fill will be at the elevation of the coal

Valley fill and head-of-hollow fill means a structure consisting of any materials other than waste placed so as to encroach upon or obstruct to any degree any natural stream channel other than those minor channels located on highland areas where overland flow in natural rills and gullies is the predominant form of runoff. Such fills are normally constructed in the uppermost portion of a V-shaped valley in order to reduce the upstream drainage area (head-of-hollow fills). Fills located farther downstream (valley fills) must have larger diversion structures to minimize infiltration. Both fills are characterized by rock underdrains and are constructed in compacted lifts from the toe to the upper surface in a manner to promote stability.

The application of 30 CFR 715.15 (b) is triggered by 30 CFR 715.15 (a) (8) and by the definition of valley fill and head-of-hollow fill. 30 CFR 715.15(a)(8) (42 FR 62683 (Dec. 13, 1977)) reads as follows:^s

If any portion of the fill interrupts, obstructs, or encroaches upon any natural drainage channel, the entire fill is classified as a valley [fill] or head-of-hollow fill and must be designed and constructed in accordance with the requirements of paragraph (b) of this section.

There is no question that Dean was involved in disposing of spoil

F.N. 1—Continued

seam. In all other head-of-hollow fills, the top surface of the fill, when completed, is at approximately the same elevation as the adjacent ridge line, and no significant area of natural drainage occurs above the fill draining into the fill area.

"*Valley fill* means a fill structure consisting of any material other than coal waste and organic material that is placed in a valley where side slopes of the fill measured at the steepest point are greater than 20° or the profile of the hollow from the toe of the fill to the top of the fill is greater than 10°."

^s The language of 30 CFR 715.15(a)(8) has been deleted from the May 25, 1979, regulations. 44 FR 30610, 30629.

from its mining operation and that this material was being placed in a certain area. Since there is no requirement in 30 CFR 715.15(b), 30 CFR 715.15(a)(8), or 30 CFR 710.5 that an area being filled be proved to be a "valley" in order that the 30 CFR 715.15(b) requirements apply, the question is whether the material was placed in an area that would qualify the fill as a valley fill pursuant to 30 CFR 715.15(a)(8) and the definition of valley fill in 30 CFR 710.5. That is, did any portion of the fill interrupt, obstruct, or encroach upon any natural drainage channel (30 CFR 715.15(a)(8)) or, in other words, was the fill material placed so as to encroach upon or obstruct to any degree any natural stream channel (30 CFR 710.5)?

Despite the fact that the ALJ stated that OSM failed "to establish the existence of a 'natural stream' as defined in 30 CFR 710.5 and a review of the photographic evidence presented by respondent clearly shows the impossibility of such a 'natural stream channel' or even a natural drainage channel" (ALJ's decision at 7), there is ample evidence to show that OSM carried its burden of going forward to establish a prima facie case as to the validity of the notices. See 43 CFR 4.1171(a).

Ronnie Vickers, one of the OSM reclamation specialists who inspected the operation, testified that Dean had constructed a dam across the mouth of the area in question and that fill was being placed behind the dam (Tr. 11, 32-33). He

also stated that on Aug. 3, 1978, water was flowing into the fill area toward the mouth of the area in question (Tr. 64-65). Jack Spadaro, a mining engineer with OSM experienced in reviewing the design and construction of valley fills in surface mines, testified, after examining Applicant's Exh. 2, a topographical map, that the crest of the ridge was at approximately 2,000 feet; that the valley fill was at about 1,800 feet; that the slope was inward toward the valley fill; and that all drainage in the area would be toward the valley fill (Tr. 88). When asked how he would determine the existence of a natural stream channel, Spadaro responded that he would examine a topographic map and determine from that where the water would flow and if there was any significant watershed contributing drainage, he would say it was a natural drainway or natural water course (Tr. 97). When asked, "Does that water [OSM's photographic Exh. R-9-A] indicate that water is draining into that fill area?" he answered, "Yes" (Tr. 98).

On cross-examination Spadaro testified that the area of Dean's operation depicted in OSM's photographic Exh. R-9-A would not fall within the exception in the definition of valley fill for minor channels located on highland areas where overland flow in natural rills and gullies is the predominant form of runoff. He considered a natural rill or gully to be only a few feet deep (Tr. 99). When questioned further whether he would consider

what he saw in Exh. R-9-A to be a natural stream, Spadaro stated:

A. Yes.

Q. Where does it flow to?

A. It flows downstream to the bottom portion.

Q. I thought you said it wasn't a flow.

A. It's backed up, but it would under ordinary conditions flow.

Q. Where did it come from?

A. It came from the watershed above the fill.

(Tr. 100.)

[1] The testimony of the OSM witnesses cited above and its exhibits (especially Exh. R-9-A and R-9-F) establish that the fill created by Dean interrupted, obstructed, or encroached upon a natural drainage channel or stream channel.⁴ The fact that Dean may have begun constructing a fill which interrupted, obstructed, or encroached upon a natural drainage or natural stream channel prior to May 3, 1978, does not excuse Dean from complying with federal requirements when it subsequently continued filling actions in August and September 1978. Dean's dumping of fill behind the dam was an interruption, obstruction, or en-

⁴ The ALJ's decision (p. 8) seems to confirm the existence of evidence to support a finding that Dean's fill interrupted, obstructed, or encroached upon "any natural drainage channel" when he stated—

"The fact that water may have been flowing from the impoundment shown in Respondent's Exh. 9-A (Tr. 31-32, 64-65) does not alter the fact that no sufficient proof existed that water was flowing *into* this impoundment from the area above the highwall shown in Respondent's Exh. 9-A, other than when it rained, which was admitted by Applicant (Tr. 114-115) and which would be obvious to anyone looking at the area." (Italics added.)

September 11, 1979

croachment within the meaning of the regulations. It is the intent of sec. 715.15(a)(8) that all fills that encroach upon or obstruct any natural stream channel, other than those channels on highland areas such as natural rills and gullies, meet the requirements set forth in sec. 715.15(b). See 42 FR 62648, Comment 11 (Dec. 13, 1977), and 30 CFR 710.5.

It is also clear that while Dean may have been complying with the requirements of its state permit in constructing the valley fill, it was not in compliance with the federal requirements. As we held in *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979), compliance with state mining permit conditions does not excuse noncompliance with the initial federal performance standards.

[2] The prima facie case having been established, Dean failed in its ultimate burden of persuasion.⁵ In fact, the testimony of Aubra Dean, an officer in the company, rather than rebutting, served to bolster OSM's showing that the fill was being constructed in a natural drainage channel (Tr. 101, 114-15, 117).

For the above-stated reasons, we must conclude that while Dean had begun its operations prior to implementation of the interim regulations and had partially filled the valley at the time the OSM inspec-

tors first visited the site,⁶ the action of Dean in August 1978, and subsequently, resulted in the fill interrupting, obstructing, or encroaching upon a natural drainage channel or natural stream channel.

The ALJ's decision is reversed as to violation No. 1 of Notice of Violation No. 78-I-18-3, Notice of Violation No. 78-I-15-3, and Notice of Violation No. 78-I-15-6.

WILL A. IRWIN,

Chief Administrative Judge.

IRALINE G. BARNES,

Administrative Judge.

MELVIN J. MIRKIN,

Administrative Judge.

STATE OF ALASKA

v.

DANIEL JOHNSON

42 IBLA 370

Decided September 11, 1979

Appeal from decision of the Alaska State Office, Bureau of Land Management, partially rejecting state selection applications A-050580 and A-060527.

Remanded.

1. Alaska: Land Grants and Selections: Generally—Alaska: Native

⁵ 43 CFR 4.1171(b) states that in proceedings to review notices of violation the applicant for review shall have the ultimate burden of persuasion.

⁶ OSM inspector, Ronnie Vickers, testified that the fill was only 20 to 25 percent complete on Aug. 3, 1978 (Tr. 62). On the other hand, Aubra Dean testified that two thirds of the fill material was in the hollow by May 3, 1978 (Tr. 103).

**Allotments—Appeals—Contests and
Protests: Generally—Rules of Prac-
tice: Government Contests—Rules of
Practice: Private Contests**

Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the determination to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not prior to its appeal been afforded notice of the election, it should be afforded an opportunity to make such election.

**2. Alaska: Land Grants and Se-
lections: Generally—Alaska: Land
Grants and Selections: Mental Health
Lands—Alaska: Native Allotments**

A selection filed by the State of Alaska is subject to prior valid existing rights of Natives, irrespective of whether the State selection was filed pursuant to the Alaska Mental Health Enabling Act or the Statehood Act.

APPEARANCES: Thomas E. Meacham, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska; Frederick Torrisi, Esq., Alaska Legal Services Corporation, Dillingham, Alaska, for Daniel Johnson.

**OPINION BY
ADMINISTRATIVE JUDGE
FISHMAN**

**INTERIOR BOARD
OF LAND APPEALS**

The State of Alaska has appealed from a July 6, 1977, decision of the Alaska State Office, Bureau of Land Management (BLM), giving tentative approval to the allotment application of Daniel Johnson and withdrawing prior tentative approval of the State of Alaska's selection application for the same land.

The State of Alaska's selection application A-050580 (filed on Nov. 11, 1959) was amended on Aug. 16, 1962, to include the land here in issue, lot 8, NE 1/4 SE 1/4 sec. 6, and lots 1 and 6 sec. 7, T. 7 N., R. 11 W., Seward meridian. These lands were also included in a homestead entry, A-52822, filed on Aug. 15, 1960. The homestead entry failed and was closed on Aug. 12, 1966.

On Apr. 13, 1972, the Bureau of Indian Affairs filed Native allotment application AA-7597 for 79.18 acres for lot 8, NE 1/4 SE 1/4 sec. 6, T. 7 N., R. 11 W., Seward meridian, on behalf of Daniel Johnson. Johnson claimed use and occupancy from May 1957 for fishing, hunting, trapping, and berry picking.

On June 16, 1972, the State of Alaska further selected the land (A-060527) pursuant to the Alaska Statehood Act, 72 Stat. 339, as amended, 48 U.S.C. Chap. 2, note (1976).

A BLM field report, filed in January 1973, states that a cabin was found on the land but that there was no verification of use. The report also contains the following findings:

Based on the evidence on the ground the applicant has been using the land in the recent past.

The applicant's use prior to the homestead entry was not adequate to qualify for an allotment, and the applicant's use during the time the homestead was of record could not qualify as legal use and occupancy since the use was not potentially exclusive. However, since the applicant lives near the tract, it is assumed that the applicant has made legal use of the land since the time the homestead failed.

* * * * *

The examiner assumes that the land was open and recommends that the applicant be granted the tract * * *.

In response to BLM's request for further information bearing on applicant's use of the land, five witnesses, including the allotment applicant, submitted statements. The witnesses indicated that they had seen the applicant use the land, that the applicant had a family when using the land, that the land was used for berrypicking, wood gathering, and food gathering, and that a cabin was on the land.

Based on this information, BLM held application AA-7597 for approval, reserving coal, oil, and gas to the United States. The decision appealed from also held for rejection State selection A-050580 allowing the State of Alaska 30 days to initiate a private contest against the allotment applicant pursuant to 43

CFR 4.450. The decision further stated:

Failure of the State to initiate a private contest within the time indicated above will result in the Native allotment being approved, the tentative approval being modified in part, and the State selection being rejected as to the lands in Mr. Johnson's allotment application. This action will become final without further notice.

The decision also advised the State of its right to appeal to this Board.

The State of Alaska appeals on several grounds. First, it asserts, citing *State of Alaska, John Nusunginya*, 28 IBLA 83 (1976), that the burden is on BLM to initiate its own contest proceedings against the later-filed Native allotment applicant in which the State may appear as an interested party. The State contends that a BLM-initiated contest with a full evidentiary hearing is required for a determination as to whether the applicant established a valid claim. The State maintains that unless and until the Native allotment applicant's claim is sustained in a BLM contest proceeding "the State's Mental Health [Alaska Mental Health Enabling Act, 70 Stat. 709 (July 28, 1956)] grant selection applications stand as prior-filed applications, thus segregating the land from later appropriation by [the allotment applicant]."

The State further argues that since selection application A-050580 was made pursuant to the Alaska Mental Health Enabling Act, *supra*, and regulations thereunder, there could be nothing "tentative" about BLM's approval of such selection

and the State's equitable title to the land vested absolutely. Therefore, it is argued, BLM was without power to subsequently modify the approval granted the State on Dec. 1, 1966.

The State's final argument is directed to the weakness of evidence upon which BLM held for approval applicant Johnson's allotment application.

We shall treat each of these arguments in turn.

[1] *John Nusunginya, supra*, does not support the proposition for which appellant has cited that case, namely that the Department must initiate a contest even though BLM may be fully satisfied that the Native applicant has fulfilled his obligation under the Allotment Act.

The Board in *State of Alaska*, 41 IBLA 309, 312, 313 (1979), stated that:

In *Nusunginya, supra* [28 IBLA 83], the Board held that the evidence of the allotment applicant's compliance was not "satisfactory to the Secretary of the Interior," although it was deemed satisfactory to BLM. Therefore, the Board reversed the BLM decision, and because of the requirement that a Native allotment cannot be summarily rejected without notice and opportunity for an oral hearing, the Board directed that BLM initiate a Government contest proceeding against the allotment claim. * * * This result flowed exclusively from the Board's conclusion that BLM had erred in finding that Nusunginya's evidence was ultimately sufficient to prove his qualification to the satisfaction of the Secretary. It did not hold, and may not be construed as holding, that BLM must bring a Government contest in every case where an allotment application was filed later than the State's application for the same land. [Footnote omitted.]

The question ultimately raised by the State's first argument is whether it was afforded a proper opportunity to participate in the BLM determination. In *Natalia Wassiliey*, 17 IBLA 348 (1974), we held that the State's interest in its selection application was adverse to that of a Native allotment applicant and that the State should be served with copies of documents relating to the allotment application and be "afforded an opportunity to set forth its position on whether the occupancy of the Native would be sufficient to prevent the State's selection rights from attaching to the land." *Id.* at 352.

The decision of the instant case was adverse to the State in that it advised that the allotment application was held for approval, that the selection application was held for rejection in part, and that if the State failed to initiate a contest within the time allotted, the "action will become final without further notice."

As we observed in *State of Alaska supra*, the State has an election of remedies. It may either initiate a private contest (43 CFR 4.450-1), or appeal to this Board. The consequence of the latter action, with an ensuing decision by the Board, is that no further appeal will lie in this Department, the administrative remedy is exhausted, and the State will have no further administrative recourse if the Board affirms the BLM decision. But in the case at bar, the State was not apprised of the necessity of making a binding

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election between (1) initiating a contest, or (2) allowing the decision to become final by the expiration of 30 days and then appealing, agreeing *sub silentio* to be bound by the Board's determination. In other words, if, in the circumstances, the Board should find that the Native allotment is proper for allowance, the State would have no further recourse before the Department.

[2] The State's second argument attempts to draw a distinction between the effect of approvals of State selections made under the Alaska Mental Health Enabling Act and those made under the Statehood Act. Sec. 202(a) of the Mental Health Enabling Act provides:

Sec. 202. (a) The Territory of Alaska is hereby granted and shall be entitled to select, within ten years from the effective date of this Act, not to exceed one million acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: *Provided*, That nothing herein contained shall affect any valid existing rights. All lands duly selected by the Territory of Alaska pursuant to this section shall be patented to the Territory by the Secretary of the Interior.

The regulation to which the State adverts is 43 CFR 2222.9-4(d) (1966) which provides:

(d) *Effect of approval of selections.* Following the selection of lands by the State and the *tentative* approval of such selection by the authorized officer of the Bureau of Land Management, the State is authorized to execute conditional leases and to make conditional sales of such selected lands, pending survey of the exterior boundaries of the selected area, if necessary, and issuance of patent. Said officer will notify the appropriate State

official in writing of his tentative approval of a selection after determining that there is no bar to passing legal title to the lands to the State other than the need for the survey of the lands or for the issuance of patent or both. [*Italic added.*]

The text of the later regulation, 43 CFR 2627.3(d), is identical; both regulations provide for *tentative* approval of lands selected by the State. The distinction contended for simply does not exist, and the effects of a State selection irrespective of the Act under which it was made is subject to prior valid existing rights of Natives. These rights have been preserved by a chain of legislation beginning with the Organic Act of May 17, 1884, 23 Stat. 24, 26. Even the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601-1628 (1976), which extinguished all claims of title based on use or occupancy of the lands, provides at 43 U.S.C. § 1617 (1976) (sec. 18) that Native allotments, pending on the date of enactment, could be processed to conclusion. Thus, if Johnson used and occupied the land according to the prerequisites of the Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), prior to the State selection application, the land was not vacant, unappropriated, or unreserved under the statute.

Since the State has not yet been afforded an opportunity to make an informed election as stated above, it is appropriate that it be afforded such an opportunity at this time.

Accordingly, pursuant to the authority delegated to the Board of

Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we remand the case to the Alaska State Office, BLM, for appropriate action consistent herewith.

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

ALABAMA BY-PRODUCTS CORP.

1 IBSMA 239

Decided September 14, 1979

Appeal by the Office of Surface Mining Reclamation and Enforcement from a decision by Administrative Law Judge Torbett, dated Mar. 13, 1979, in which he vacated two notices of violation issued for alleged topsoil handling procedures violations. (Docket Nos. NX 8-26-R and NX 8-27-R.)

Remanded.

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Performance Requirements; State Regulation—Surface Mining Control and Reclamation Act of 1977: State Regulation

Regardless of whether a permittee has a mining and reclamation plan approved by the state regulatory authority before the interim regulations became effective, that plan must meet the requirements of the regulations.

2. Surface Mining Control and Reclamation Act of 1977: Topsoil: Alternative Materials

Even when the regulatory authority has approved the use of alternative materials in place of topsoil, the alternative materials must be handled in accordance with 30 CFR 715.16(a)(4)(iii).

3. Surface Mining Control and Reclamation Act of 1977: State Regulation—Surface Mining Control and Reclamation Act of 1977: Topsoil: Alternative Materials

In order for the regulatory authority's approval of a permittee's use of alternative materials in place of topsoil to be timely, it must be given before alternative material is substituted for topsoil.

APPEARANCES: J. T. Begley, Esq., Field Solicitor (Knoxville), Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, and Jan Chrisman, Esq., Office of the Solicitor, Washington, D.C., all for respondent-appellant Office of Surface Mining Reclamation and Enforcement; Fournier J. Gale, Esq., Cabaniss, Johnston, Gardner, Dumas & O'Neal, and J. Fred McDuff, Esq., for applicant-appellee Alabama By-Products Corp.

OPINION BY THE BOARD OF SURFACE MINING AND RECLAMATION APPEALS

In 1977, Alabama By-Products Corp. (ABC) developed the mining and reclamation plan which is the subject of this action. It showed the plan at a meeting of the Alabama Surface Mining Commission (Commission) on Nov. 15, 1977. It also discussed the plan with the Direc-

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tor of the Commission on various occasions. As a result of those presentations, ABC maintains the Commission approved its plan, including a portion which provides for the use of materials other than the native topsoil for revegetation.

On Aug. 16, 1978, an inspector for the Office of Surface Mining Reclamation and Enforcement (OSM), acting pursuant to the authority of the Surface Mining Control and Reclamation Act of 1977 (Act),¹ issued two notices of violation to ABC, each notice alleging a violation of the topsoil handling regulations (30 CFR 715.16). ABC filed applications for review of both notices on Sept. 14, 1978. The two applications were consolidated for purposes of a hearing and the Administrative Law Judge (ALJ) held a hearing on the applications on Mar. 1, 1979. At the conclusion of the hearing, the ALJ delivered an oral decision (confirmed in writing on Mar. 13, 1979) in which he found (1) that ABC had proved that it had obtained approval for the use of alternative materials from the Commission and (2) that ABC had shown to the ALJ that its use of alternative materials was equal to or better than the use of the native topsoil for purposes of revegetation. OSM appealed from that decision on Apr. 16, 1979, and, after request from ABC, the Board held an oral argument in the case on July 10, 1979.²

¹ 30 U.S.C. §§ 1201-1328 (Supp. I, 1977); P.L. 95-87, 91 Stat. 455 (1977).

² ABC has also urged that the Board deem itself barred from hearing this matter as a

Issues on Appeal

1. Whether the regulatory authority approved the ABC alternative materials plan in conformance with the interim regulations.

2. If so, whether ABC handled the alternative materials in a manner required by the regulations.

Discussion

Before there was any federal compulsion (the Act was signed into law on Aug. 3, 1977, and the interim regulations became effective on Dec. 13, 1977), ABC developed the plan which has become the subject of this appeal.³ Unlike some similar mining plans, ABC's plan addressed many of the reclamation problems for which the Act was created; this, however, could not knowingly have been done in accordance with the exact formula of the yet-to-be promulgated regulations. Although these pre-federal involvement efforts of ABC may be commendable, OSM has elected to test their adequacy; therefore, the fundamental question before us is whether or not ABC has complied with the applicable law.

The determination below was that since the mining plan was pre-

result of the temporary injunction in *Virginia Surface Mining and Reclamation Ass'n., Inc. v. Andrus*, No. 78-0244-B (W. D. Va. Feb. 12, 1979), which barred enforcement of the Act in Virginia. The injunction is not applicable, however, because (1) the activities occurred in Alabama, not Virginia, and (2) the injunction was dissolved in *Virginia Surface Mining and Reclamation Ass'n., Inc. v. Andrus*, No. 79-1148 (4th Cir. Aug. 10, 1979).

³ The plan was presented to the Commission on Nov. 15, 1977 (Tr. 10).

pared and presented to the Commission before the interim regulations were adopted, the proper issue is not whether the requirements of the interim regulations were met but whether the reclamation would work. Apparently, "work" was intended to mean that the alternative materials to the topsoil are as suitable for revegetation and erosion management as is the native topsoil. As there was no real evidence that the plan was not working, the ALJ felt that the law required him to find for ABC (Tr. 134, 135, appended to, and part of, the ALJ's decision). We do not agree with this determination for the reasons hereafter stated.

[1] We held in *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979), that compliance with a state permit condition does not excuse noncompliance with the interim regulations. Similarly, regardless of whether or not ABC had a mining and reclamation plan approved by the State of Alabama before the regulations became effective, that plan must now meet the requirements of the interim regulations.

[2] The interim regulations require that "[a]ll topsoil shall be removed unless use of alternative materials is approved by the regulatory authority in accordance with paragraph (a) (4)."⁴ In addition to the

specific demonstration absolutely required by the regulations, the regulatory authority⁵ may require additional analyses. Even with a satisfactory demonstration and approval of the use of alternative material,

this section on areas graded to the approved postmining configuration. The topsoil shall be segregated, stockpiled, and protected from wind and water erosion and from contaminants which lessen its capability to support vegetation if sufficient graded areas are not immediately available for redistribution.

"(a) *Topsoil removal.* All topsoil to be salvaged shall be removed before any drilling for blasting, mining, or other surface disturbance.

"(1) All topsoil shall be removed unless use of alternative materials is approved by the regulatory authority in accordance with paragraph (a) (4) of this section. Where the removal of topsoil results in erosion that may cause air or water pollution, the regulatory authority shall limit the size of the area from which topsoil may be removed at any one time and specify methods of treatment to control erosion of exposed overburden.

* * * * *

"(4) Selected overburden materials may be used instead of, or as a supplement to, topsoil where the resulting soil medium is equal to or more suitable for vegetation, and if all the following requirements are met:

"(i) The permittee demonstrates that the selected overburden materials or an overburden-topsoil mixture is more suitable for restoring land capability and productivity by the results of chemical and physical analyses. These analyses shall include determinations of pH, percent organic material, nitrogen, phosphorus, potassium, texture class, and water-holding capacity, and such other analyses as required by the regulatory authority. The regulatory authority also may require that results of field-site trials or greenhouse tests be used to demonstrate the feasibility of using such overburden materials.

"(ii) The chemical and physical analyses and the results of field-site trials and greenhouse tests are accompanied by a certification from a qualified soil scientist or agronomist.

"(iii) The alternative material is removed, segregated, and replaced in conformance with this section."

⁵ "State regulatory authority means the department or agency in each State which has primary responsibility at the State level for administering the Act" in the initial program. 30 CFR 700.5. It is not questioned that the Commission so qualifies.

⁴ 30 CFR 715.16(a) (1). The relevant parts of the regulation provide:

"§ 715.16 Topsoil handling.

"To prevent topsoil from being contaminated by spoil or waste materials, the permittee shall remove the topsoil as a separate operation from areas to be disturbed. Topsoil shall be immediately redistributed according to the requirements of paragraph (b) of

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the alternative material must still be "removed, segregated, and replaced in conformance with this section." 30 CFR 715.16(a) (4) (iii).

Although the requirements of 30 CFR 715.16 are themselves detailed and technical, there is no specific, technical diktat on how the regulatory authority shall conduct its approval process. The details of the submission by the operator are specified. Those of the process to be employed by the regulatory authority for approving the use of alternative materials are not. Consequently, we will confine ourselves to considerations of whether, not how, an effective approval was issued,⁶ and whether the alternative material was "removed, segregated, and replaced" in the required manner.

[3] OSM has also questioned whether the regulatory authority ever could have given its approval because the only evidence presented indicated that it lacked a quorum when the plan was presented to it (Exh. A-10) and that the Director of the Commission, who did ap-

prove, lacked the authority to act for the Commission. Even though OSM might not necessarily be precluded from challenging whether an official of a regulatory authority may act for the regulatory authority,⁷ in view of the undisputed testimony by Virgil Willett that he could act on behalf of the Commission (Tr. 30, 33), we will not entertain in this case any challenge to that authority but only as to whether his actions amounted to the requisite approval under 30 CFR 715.16(a)(1). Furthermore, the regulations are silent on the timing of approval, and, therefore, so long as approval occurs before the alternative material is substituted for the native topsoil, it will be considered timely.⁸

It is the fact of approval that is important. Although there is evidence, as suggested above, that the regulatory authority approved something that ABC proposed, it is not altogether certain when it was approved or whether it was what is required by 30 CFR 715.16.

As we have stated, approval is only the first step. The next is whether removal, segregation, and replacement of alternative material conforms with the regulatory requirements. This is something also determined by facts, not agreement.

⁶ ABC has objected to OSM's allegedly having waived any objection at the hearing to the manner in which approval was obtained and then having raised the issue for the first time on appeal. The question of approval is the *sine qua non* of this case. Unless it exists, we do not even get to the further question of performance. Approval is a matter of avoidance which ABC must establish and prove. See *Howard v. Green*, 555 F. 2d 178 (8th Cir. 1977). We are not saying that it cannot, under any circumstances, be conceded, or waived by OSM, but the evidence of concession must be certain. It is not in this case. This is in no little part due to the alteration of normal hearing procedure which would require OSM to present its case first. 43 CFR 4.1171(a). Instead, and without explanation, ABC went first.

⁷ The Commission is composed of five members. Although not a member, Willett is the Director of the Commission.

⁸ In regard to approvals received before Dec. 13, 1977, prudence would suggest that, at the very least, some statement be obtained from the regulatory authority to the effect that the requirements of 30 CFR 715.16 were complied with.

with or approval by a regulatory authority. If a notice of violation is issued which challenges whether the alternative material is being handled properly, it is the evidence on that question, not any approbation of a regulatory authority, that is important. In this case it is not at all clear whether the ALJ found that there was evidence before him that was sufficient to demonstrate either proper or improper handling of the alternative material.

Therefore this case is remanded to the Hearings Division to ascertain:

1. Whether the demonstration made by ABC and the approval given by the state regulatory authority were commensurate with the requirements of 30 CFR 715.16(a) (4) (i) and (ii);

2. Whether approval, if commensurate with those requirements, was made before the use of alternative materials was commenced; and

3. Whether the alternative materials were being removed, segregated, and replaced in conformance with 30 CFR 715.16.

The ALJ may also pursue any other purpose not inconsistent herewith, including, but not limited to, the issuance of a new or modified decision.

MELVIN J. MIRKIN,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

DENNIS R. PATRICK

1. IBSMA 248

Decided September 14, 1979

Petition for award of costs and expenses filed by Dennis R. Patrick based on the Board's final determination in Dennis R. Patrick, 1 IBSMA 158, 86 I.D. 266 (1979).

Petition denied.

1. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees: Bad Faith

An award of costs and expenses including attorneys' fees may be awarded to a permittee from OSM only if the permittee establishes that OSM took enforcement action in bad faith and for the purpose of harassing or embarrassing the permittee.

APPEARANCES: David O. Smith, Esq., and Marcia A. Smith, Esq., Smith and Smith, Corbin, Kentucky, for petitioner, Dennis R. Patrick. John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for respondent, the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On Apr. 24, 1979, the Board issued its decision in *Dennis R. Patrick*, 1 IBSMA 158, 86 I.D. 266 (1979), reversing the decision of the Administrative Law Judge and

ruling in favor of Patrick. Subsequently, Patrick filed a timely petition for award of costs and expenses, pursuant to sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977¹ and 43 CFR 4.1294(c). Petitioner is seeking an award of costs and expenses, including attorneys' fees and expert witness fees, from the Office of Surface Mining Reclamation and Enforcement (OSM). In support of his petition he has filed the following: (1) Appellant's Affidavit on his Costs and Expenses; (2) Appellant's Receipts and Other Evidence of his Costs and Expenses; (3) Attorney's Affidavit on Reasonableness of Fees; and (4) Appellant's Affidavit on OSM's Bad Faith and his Injuries.

Sec. 525(e), 30 U.S.C. § 1275(e) (Supp. I 1977), of the Act, which provides for the awarding of costs and expenses in an administrative proceeding, reads:

Whenever an order is issued under this section, or as a result of any administrative proceeding under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.

The procedural regulations promulgated by the Department to implement that section are 43 CFR

4.1290-4.1296. Petitioner seeks his award under 43 CFR 4.1294, entitled, "Who may receive an award." It reads:

Appropriate costs and expenses including attorneys' fees may be awarded—

* * * * *

(c) To a permittee from OSM when the permittee demonstrates that OSM issued an order of cessation, a notice of violation or an order to show cause why a permit should not be suspended or revoked, in bad faith and for the purpose of harassing or embarrassing the permittee; * * *.

[1] In this case petitioner must show that OSM initiated its enforcement action against him in bad faith and for the purpose of harassing or embarrassing him in order to recover against OSM.

Petitioner's affidavit on OSM's bad faith and his injuries (Exh. D of the petition) details the factors which he believes establish that OSM acted in bad faith and that these actions served to harass or embarrass him.

Petitioner charged generally that OSM enforcement actions against him were politically motivated; that he received conflicting information from OSM concerning citizen complaints; that OSM contributed to a newspaper article specifically to embarrass him;² that OSM unfairly

¹ 91 Stat. 445, 512, 30 U.S.C. § 1275(e) (Supp. I 1977).

² While it is true that OSM contributed to a newspaper article concerning petitioner's case, it is possible that, rather than attempting to embarrass petitioner, OSM was trying to be cooperative with the media. We note, however, that OSM used less than good judgment in discussing the results of petitioner's minesite hearing with the newspaper reporter prior to informing petitioner or petitioner's counsel of the minesite hearing decision.

refused to settle his case; and that another individual who was involved in a similar operation and was cited by OSM for violations of the Act was treated more favorably than petitioner.

Petitioner's charges are grounded primarily on his personal beliefs as to the motivation for the actions taken by OSM. Petitioner failed to provide any independent factual support for his beliefs. The events he relies upon to support his beliefs do not make a convincing demonstration of bad faith, either independently or collectively. Moreover, OSM's responding affidavits provide reasonable explanations for these events.

Especially in a situation such as this in which the final order of the Department resolves a difficult issue and the outcome is close, bad faith must be proved by more than assertions of personal belief. Petitioner has failed to establish that OSM took enforcement action against him in bad faith and for the purpose of harassing or embarrassing him. Therefore, his petition is denied.

WILL A. IRWIN,
Chief Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

APPEAL OF THE ALASKA RAILROAD (On Reconsideration)

3 ANCAB 351

Decided *September 18, 1979*

Appeal from a decision of the Bureau of Land Management AA-6661-A in the matter of Patent Number 50-78-0015 issued to Eklutna, Inc., and Patent Number 50-78-0016 issued to Cook Inlet Region, Inc.

Motions for Reconsideration of the Decision of the Alaska Native Claims Appeal Board in Appeal of Alaska Railroad, 3 ANCAB 273 (June 7, 1979) [VLS 79-5] granted.

Decision affirmed in part, vacated in part.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

The effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction of the Department of the Interior over the lands conveyed. The proper forum to further adjudicate the status of such an interest is in a judicial proceeding and the Board lacks jurisdiction to decide the issue.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

Sec. 316 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2770, 43 U.S.C. §§ 1701-1782 at 1746 (1976), was not intended to alter the long-established rule regarding the Department of the Interior's loss of juris-

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diction to adjudicate interests in land following the issuance of patent for that land.

3. Alaska Native Claims Settlement Act: Definitions: Public Lands—Alaska Native Claims Settlement Act: Land Selections: Withdrawals

On reconsideration, the Board vacates its prior holdings that lands withdrawn under the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I, 1977), are lands held for the benefit of Indians, Aleuts and Eskimos and thus are not "public lands" within the scope of FLPMA, *supra*, and that FLPMA does not apply to such lands.

APPEARANCES: William J. Wong, Esq., on behalf of the Alaska Railroad; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Joyce E. Bamberger, Esq., on behalf of Cook Inlet Region, Inc.; Edward G. Burton, Esq., Burr, Pease & Kurtz, Inc., on behalf of Eklutna, Inc.

**OPINION BY
ALASKA NATIVE CLAIMS
APPEAL BOARD**

SUMMARY OF DECISION

The Board, in the decision being reconsidered, held that the Department lost jurisdiction, upon issuance of patent, to adjudicate interests in the patented lands. A secondary holding was that lands withdrawn for selection under the Alaska Native Claims Settlement Act (ANCSA) were lands "held for the benefit of Indians, Aleuts, and Eskimos" and thus were excluded from the meaning of "public lands"

as defined in the Federal Land Policy and Management Act (FLPMA). The conclusion was that FLPMA did not apply to lands withdrawn under ANCSA, and that the patent correction provisions in § 316 of FLPMA could not authorize changes in patents issued under ANCSA.

On reconsideration, the Board affirms its basic ruling on lack of jurisdiction over patented lands but vacates its conclusion that FLPMA did not apply to lands withdrawn under ANCSA. The Board rejects the argument that § 316 of FLPMA authorizes the Secretary of the Interior to unilaterally impose, without consent of the patentee, a right-of-way upon lands to which a patent has issued.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 & Supp. I 1977) (hereinafter ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

**SUMMARY OF ORIGINAL
DECISION AND MOTIONS
FOR RECONSIDERATION**

The Board, in its original decision rendered on June 7, 1979, held that the Department of the Interior

lost jurisdiction, upon issuance of patent, to adjudicate interests in the land described in the patent. Rejecting the position of the Alaska Railroad, the Board also held that 43 U.S.C. § 1746 (§ 316 of FLPMA) did not apply to lands withdrawn by § 11 of ANCSA pending their selection and conveyance, because such lands are "held for the benefit of Indians, Aleuts, and Eskimos," and thus are excluded from the scope and meaning of "public lands" as defined in 43 U.S.C. § 1702(e) (1976). As § 1746 authorizes correction of "documents of conveyance issued pursuant to * * * Acts relating to the disposal of *public lands*," the Board concluded the provision does not apply to the lands in issue. [Italics added.]

On July 5, 1979, the Bureau of Land Management (BLM) moved for reconsideration. The BLM agreed that the Board lacked jurisdiction to hear the merits of the appeal, but claimed that the Board had erred in finding that lands withdrawn by ANCSA are held for the benefit of Indians, Aleuts, and Eskimos, and thus are not "public lands" as that term is defined in FLPMA.

On July 16, 1979, the Alaska Railroad also moved for reconsideration. The Railroad asserted that the Board had not addressed the Secretary of the Interior's alleged failure to make a determination, pursuant to § 3(e) of ANCSA, of the smallest practicable tract enclosing land actually used in con-

nection with the administration of a Federal installation (*i.e.*, the Alaska Railroad), and that this alleged failure was an error which could be remedied by the Secretary's correction, pursuant to 43 U.S.C. § 1746, of the patents previously issued for the subject lands. The Railroad also alleged error in the Board's finding that the lands in issue had been withdrawn by § 11 (a) (1) of ANCSA, on the grounds that the lands in issue were not "public lands" as defined in § 3(e) of ANCSA.

DECISION AND ORDER

[1] The Board reaffirms that portion of its prior decision which held:

The effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction of the Department of the Interior over the lands conveyed. [Citations omitted.] The proper forum to further adjudicate the status of such an interest is in a judicial proceeding and the Board lacks jurisdiction to decide the issue. *Appeal of Choggiung, Limited*, 3 ANCAB 100, 103 (Nov. 20, 1978) [VLS 78-49].

[*Appeal of Alaska Railroad*, 3 ANCAB 273, 276, 86 I.D. 397 (1979) [VLS 79-51].]

The Alaska Railroad, in its Motion to Reconsider, alleged that the disputed lands are "public lands" as that term is defined and used in FLPMA. The Alaska Railroad further alleged that ANCSA is an Act "relating to the disposal of public lands" and that docu-

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ments of conveyance issued pursuant to ANCSA were "issued * * * to dispose of public lands" within the meaning of 43 U.S.C. § 1746 (1976).

[2] Without ruling on the Railroad's allegations, after review and consideration of FLPMA and its legislative history, the Board concludes that § 1746 was not intended to alter the long-established rule regarding the Department's loss of jurisdiction to adjudicate interests in land following the issuance by the United States of patent for that land.

This conclusion is based on the fact that, upon issuance of patent, title to lands conveyed vests in the patentee. (*Everett Elvin Tibbets*, 61 I.D. 397, 399 (1954).) The Secretary could not be authorized by statute to unilaterally deprive the patentee of any such vested interests by administrative correction of the patent.

That such unilateral action was not intended by the Congress is borne out by the legislative history of FLPMA. Sec. 316 (43 U.S.C. § 1746) provides:

The Secretary may correct patents or documents of conveyance issued pursuant to section 208 of this Act or to other Acts relating to the disposal of public lands where necessary in order to eliminate errors. In addition, the Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the Federal Government to dispose of public lands. [90 Stat. 2770]

Before FLPMA, the Secretary's authority to correct conveyance

documents was contained in 43 U.S.C. § 693 and § 694 (1970). Sec. 693 applied to mistakes in entry by purchasers of public lands at private sale. Where the purchaser had mistakenly, because of survey error, entered a tract of land different from the one he intended to buy, the Secretary was authorized to let the purchaser withdraw the entry and have the purchase price credited to other land. Sec. 694 extended this procedure to similar cases where a patent had issued, and allowed the purchaser to relinquish the patent. These sections were repealed by FLPMA, which in § 203 (43 U.S.C. § 1713 (1976)), substituted new standards and procedures for land sale.

The Secretary's administrative authority to correct patents was retained in § 316 of FLPMA.

Sec. 316 appears to be based upon § 203(f) of H.R. 13777, 94th Cong., 2d Sess., 122 Cong. Rec. 23442, 23445 (1976), which was taken without significant change from § 211 of H.R. 5224, a comprehensive federal lands bill introduced in 1975 but not passed. *See*, Staff of Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess., Legislative History of the Federal Land Policy and Management Act of 1976, p. 945, 961 (Comm. Print 1978). Testimony on H.R. 5224 before the House Subcommittee on Public Lands included the following discussion of the patent-correction provision:

Mr. Steiger. This is an amendment that the American Mining Congress was con-

cerned about. I don't really share their concern, but I think it would do no harm.

This is on page 17, line 10. It now reads "The secretary may correct such patents or documents where necessary." They want to insert the words—after the word "correct"—"typographical and clerical errors including errors in land descriptions in such patents".

I gather the concern is that the secretary not, under the guise—or somebody in the name of the secretary—of correcting a typographical or clerical error remove some land from the patents. I can only assume that it is based on some experience in the past.

Mr. Melcher. Irv, do you have a point on this?

Mr. Senzel. Yes. On this particular thing. I thought I might explain what the laws on the subject might be.

Under the law the title to the land passes when the secretary issues the patent. That land is then beyond the reach of the secretary. He cannot get to the title in any way without going to court alleging some violation of law or fraud or getting a voluntary relinquishment or reconveyance to the government so he can issue a new patent. There is no point in his issuing another patent because he has no authority.

At the same time the secretary does have authority to correct patents and the procedure is to notify the person that the patent contains an error. If he will reconvey it to the United States it will be corrected in such and such a way.

It would seem to me that if he is going to correct the patent he ought to correct any error in its making. It's clear that it has to be an error.

Mr. Steiger. What other errors do we deal with?

Mr. Senzel. It works both ways. He could insert a reservation of minerals improperly, or he could have left out the reservation of minerals.

Mr. Steiger. That is where the hang-up is, then, you see.

Mr. Senzel. The American Mining

Congress had a suggestion along these lines and they explained in there, there was a fear there would be new terms and conditions put in the patent. But if we make clear in the language it is just for correction of error—

Mr. Steiger. An error of omission could invite—if you are talking about like an error such as failing to reserve the minerals, that is a fairly significant error.

Mr. Senzel. It goes beyond the—

Mr. Steiger. It seems to me that that ought to be litigated.

Mr. Senzel. Well, *this bill would just give the secretary authority to correct the patent, but he has to get the title back. And if the person does not want to reconvey the lands for the correction, it would have to be litigated. He can't just issue another patent.*

Mr. Steiger. I see.

Mr. Senzel. *This clause clothes him with the authority to correct it once he has title again. He can't do it in the absence of either going to court or getting agreement of the patentee that the correction should be made.*

Mr. Weaver. *Mr. Chairman, the original language of the print would not allow the secretary to make corrections if he didn't hold title. Would that give him that authority? Could it?*

Mr. Senzel. *I don't think so.*

Mr. Weaver. *No. Okay.*

Mr. Melcher. Well, I—Somebody will have to advise me. I don't know. Is this an important amendment that we should adopt or not?

Mr. Steiger. I frankly feel—

Mr. Senzel. I think it limits the secretary too much. It prevents him from making a mutually agreeable correction.

Mr. Johnson. I have done a lot of abstract work and I don't see where it makes a bit of difference. They have the authority and it is all covered by the—

Mr. Steiger. Sounds like the American Mining Congress lawyer was earning his money.

Mr. Weaver. Yes.

Mr. Melcher. The gentle an—

Mr. Steiger: I ask unanimous consent that it be withdrawn.

Mr. Melcher. Without objection, so ordered.

Mr. Senzel. I'll make a few technical changes in there, too, to be sure we are talking only about errors.

Mr. Melcher. You mean you will make a modification of this language?

Mr. Senzel. In the present law to show that it has to be an error.

Mr. Steiger. We've all agreed that the term 'correct' means in reference to error.

Mr. Melcher. All right.

[House Committee on Interior and Insular Affairs, Subcommittee on Public Lands, Executive Session (May 8, 1975).] [Italics added.]

The Board notes particularly the testimony underlined.

The Subcommittee on Public Lands clearly intended that the Secretary could correct errors in patents only following the return of the patent to the Secretary. If the patentee did not wish to reconvey the patent to the Secretary for correction, the matter would have to be litigated.

The language, "[t]he Secretary may correct such patents or documents where necessary" remained substantively unchanged through the evolution of H.R. 5224 into H.R. 13777, and emerged without significant change in § 316 of FLPMA.

Therefore, the Board rejects the argument that the Secretary is empowered by § 316 of FLPMA to unilaterally impose, without consent of the patentee, a right-of-way upon lands for which a patent has previously issued. Such an action would far overstep the administrative correction of errors contemplated and

intended by the Congress in enacting § 316.

No indication of consent on the part of the patentees to a change in the subject patents has been submitted to this Board. Were such consent available, this appeal would be unnecessary.

The Board thus has no jurisdiction over this appeal and was required to grant the motions to dismiss. As stated in the original Decision and Order Dismissing Appeal, such dismissal was without regard to the merits of the appeal, which must be heard, if at all, in a judicial forum.

Finally, because the Board rejects the argument that § 316 of FLPMA grants the Secretary authority to correct a patent in such manner as urged in this appeal, the remaining holdings expressed in the original decision are unnecessary to the resolution of this appeal.

[3] The Board therefore, on reconsideration, vacates its prior holdings that lands withdrawn under ANCSA are lands held for the benefit of Indians, Aleuts, and Eskimos and thus are not "public lands" within the scope of FLPMA, and that FLPMA does not apply to such lands.

It is therefore Ordered that the Decision and Order Dismissing Appeal, issued by the Board in this appeal on June 7, 1979, is affirmed in part and modified in part as specified above and for the reasons stated. The Bureau of Land Man-

agement decision appealed from is left unaffected by this decision.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

LAWRENCE MATSON,
Administrative Judge.

EARL W. PLATT

43 IBLA 41

Decided *September 18, 1979*

Appeal from decision of the Phoenix District Office, Bureau of Land Management and recommended decision of Administrative Law Judge Michael L. Morehouse partially rejecting an application for a grazing lease and awarding a lease to a conflicting applicant. Ariz. 020-2758.

Reversed.

1. Federal Land Policy and Management Act of 1976: Grazing Leases and Permits—Grazing Leases: Preference Right Applicants—Grazing Leases: Renewal

Where two preference right applicants file conflicting applications for a grazing lease, sec. 402(c) of FLPMA, 43 U.S.C. § 1752(c) (1976), mandates issuance of the new lease to the holder of the expiring lease provided that the holder of the expiring lease maintains his or her preference right qualifications and is otherwise in conformance with the applicable rules and regulations.

APPEARANCES: Mitchel D. Platt, Esq., Platt & Platt, St. Johns, Arizona, for appellant; Lawrence A. Ruzow, Esq., and Belinda Barrington, Esq., Vlassis, Ruzow & Crowder, Phoenix, Arizona, for Barbara Garcia, appellee; Fritz L. Goreham, Esq., Office of the Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

This case involves a controversy between two applicants for grazing leases on the same public land. It arises from a decision dated May 13, 1977, by the District Manager of the Bureau of Land Management (BLM), Phoenix District Office, which rejected in part Earl Platt's application to the extent of one-third of the allowable use and awarded him a lease for two-thirds of the allowable use. It awarded the other one-third use to Barbara Garcia. Following Platt's appeal to this Board, the Area Manager of the Phoenix Resource Area of the Phoenix District Office returned Garcia's check for the grazing fees dated May 31, 1977, in effect ruling that Platt could continue with all of the privileges granted under his former lease until resolution of the appeal. See 43 CFR 4.21.

In his appeal, Platt alleged, *inter alia*, that Garcia was not qualified to hold a grazing lease because she was not in the livestock business, did not

have sufficient control over preference lands and, in any event, that the award to her was not based upon proper regulatory criteria. He also requested a hearing before an Administrative Law Judge. Garcia and BLM denied these allegations and contended that the award of privileges to her be upheld. Garcia also moved to have the Bureau decision of May 13, 1977, immediately implemented.

By Order dated Aug. 24, 1977, we denied the motion to have the decision immediately implemented and ordered a hearing pursuant to 43 CFR 4.415. We delineated the issues as follows:

The issues to be determined are whether Garcia is qualified to hold a grazing lease under the controlling regulations and, if so, whether the award properly met regulatory criteria. There are also issues concerning whether and to what extent Mrs. Garcia has control over any preference lands, and whether Mr. Platt has lost control over any preference lands. These and other issues raised by the parties, including the degree of control necessary, and any additional matters relevant to the determination of entitlement to the grazing privileges in question may be entertained by the Judge.

Pursuant to this Order, a hearing was held before Administrative Law Judge Michael L. Morehouse in Phoenix, Arizona, on Jan. 10, 1978. Following receipt of post-hearing briefs from the parties, Judge Morehouse issued a Recommended Decision dated June 1, 1978. Copies thereof were sent to the parties, and they have filed briefs

and comments to this Board. In his recommended decision, Judge Morehouse basically recommended affirming the decision of the District Manager, thus upholding the rejection of Platt's application to the one-third percentage of grazing privileges, and awarding that one-third to Garcia.

Before discussing the issues raised in the briefs, we set forth Judge Morehouse's statement of the factual background of his recommended decision as follows:

The evidence established that the Garcia Ranch, which is the subject of the controversy, consists of approximately 35 sections of patented lands, 18 sections of Federal lands, and 6 sections of State lands (see Ex. A-3). The ranch was homesteaded in the later 1800s by Jose Garcia, grandfather of Barbara Garcia's late husband, Conception. Following Jose's death, the ranch was owned and operated by his three grandsons, Emilio, Joe and Conception, from approximately 1925 to 1955. Barbara Doran married Conception Garcia in 1932. Thereafter, she resided on the ranch with her husband, Conception, who with his two brothers were in the cattle business. In 1955, Conception Garcia died, leaving his wife, Barbara, a life estate of one-third undivided interest in the ranch with their six children as remaindermen. From 1955 to 1958, Emilio, Joe and Barbara ran the ranch. In 1958, Joe sold his undivided one-third interest to Emilio and the same year Emilio and Conception's Estate leased the whole ranch to one Everett Hinkson for four years. In 1959, Earl Platt acquired Emilio Garcia's interest in the ranch. The Estate of Conception Garcia was closed in 1961, and in 1962, Earl Platt leased Barbara Garcia's one-third interest (Ex. R-3). The lease terminated on October 1, 1975. Throughout this period of time Earl Platt had been

the attorney for the Garcia brothers. Following Conception's death he represented the Estate and was also the attorney for Barbara Garcia. [1] In 1958, when Emilio acquired Joe's one-third interest, he borrowed the purchase money from Earl Platt.

The lease between Earl Platt and Barbara Garcia initially ran for a period of five years. It was renewed for three years commencing October 1, 1967, terminating September 30, 1970, and renewed again for a period of five years commencing October 1, 1970, and terminating October 1, 1975. At that time, evidently the parties were unable to reach an agreement concerning the terms of a new lease. It appears, in any case, that there may have been some kind of falling out between Mr. Platt and Mrs. Garcia, since she retained another attorney to negotiate new lease terms, which negotiations proved unfruitful (see letter dated September 30, 1975, attached to appellant's reply brief). Subsequently, a partition suit was filed in State Court, which is still pending.

Mrs. Garcia testified that before 1975 and the expiration of the lease, she made the decision to go back into the livestock business. In January, 1977, prior to filing her grazing lease application (Ex. A-2), she bought a mother cow, a bull and two horses. On January 12, 1977, she acquired a new brand certificate (Ex. A-4) from the State of Arizona and on December 17, 1977, she purchased an additional 20 head of cattle (Ex. R-5). These cattle are now on land belonging to a relative which has only limited forage. She stated that she considers herself presently in the livestock business, she intends to remain in the livestock business, and she needs her one-third share of the BLM grazing privileges that attach to the Garcia ranch.

(Dec. 3-5)

At the time our Order of Aug. 24, 1977, no party had raised, nor had the majority of this Board considered, the effect of sec. 402(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(c) (1976), on the questions presented by this appeal. That section provides, in relevant part, as follows:

So long as (1) the lands for which the permit or lease is issued remain available for domestic livestock grazing in accordance with land use plans prepared pursuant to section 1712 of this title or section 1604 of title 16, (2) the permittee or lessee is in compliance with the rules and regulations issued and the terms and conditions in the permit or lease specified by the Secretary concerned, and (3) the permittee or lessee accepts the terms and conditions to be included by the Secretary concerned in the new permit or lease, the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease.

Upon reflection, this Board is now of the view that the applicability of sec. 402(c) of FLPMA is determinative of the appeal. Platt argues that this section requires reissuance of the lease to him regardless of any other matter raised in this case. Garcia contends that this section does not require reissuance of a lease to a prior holder who no longer has the original qualifications upon which the lease was premised. BLM asserts that this section does not apply to situations where a common owner is seeking to reassert her rights and her co-owner no longer has the control over her interest in

¹In commenting on this decision, Platt vigorously denies that he was Garcia's attorney thereafter because he had no retainer agreement and she paid him no fees. Garcia testified she considered him as her attorney, however. For the purpose of this decision, their past relationship does not matter.

the land which had been used as the reference for the grazing privilege. This issue was not raised before Judge Morehouse, nor was it addressed by him.

[1] This Board has ruled that where conflicting grazing lease applicants have equal preference rights for the land, the statutory provision requires that the holder of the expiring lease be given first priority (in effect, a right of first refusal) for a new lease for the land embraced by his former lease if the statutory requirements are met. *Harvey Sheehan*, 39 IBLA 56, 86 I.D. 51 (1979); see also *George T. McDonald*, 35 IBLA 75 (1978); *Fancher Brothers*, 33 IBLA 262 (1978); *Mark X. Trask*, 32 IBLA 395 (1977); *Allen R. Prouse*, 32 IBLA 311, 84 I.D. 874 (1977). In *Trask*, *supra*, we held that if the holder of an expiring lease lost control of the private property contiguous to the public land which gave him a preference right to a lease under 43 CFR 4121.2-1(d) (1977), he would not be entitled to first priority under FLPMA for receipt of a new lease.

The decision in *Trask* was premised on the recognition that upon loss of contiguous or cornering land an individual loses the preference right afforded by sec. 15 of the Taylor Grazing Act, 43 U.S.C. § 315m (1976). Thus the Board held that since Trask no longer held a preference right to lease the land, the right of first refusal could not be exercised so long as another applicant

with contiguous or cornering land sought to lease the Federal range.

The issue presented by this appeal, however, is substantially different. While we are cognizant of the fact that a partition suit is presently pending in the state courts, the fact remains that as of now Platt has a two-thirds undivided interest in the base lands while Garcia has a one-third undivided interest in the same lands. Even assuming that Garcia has a preference right to lease the adjacent Federal range, we are of the opinion that until such time as partition actually occurs Platt, under the provisions of sec. 402(c) of FLPMA, has the right of first refusal to the entire Federal range contiguous or cornering thereto.

It is clear that if we assume that Garcia's one-third undivided interest is sufficient to vest her with a preference right, we must assume that Platt, with a two-thirds undivided interest, is similarly vested with a preference right. Thus, unlike the situation in *Trask* where the prior lease holder no longer had a preference right, in the instant case both would have a preference right. Under such a situation we can no longer find, as we did in *Trask*, that the prior Federal lessee is not in compliance with the rules and regulations issued by the Secretary. See 43 U.S.C. § 1752(c) (2).

The instant situation is clearly analogous to a situation in which there have always been two preference right holders, but where only one has ever actually exercised the

preference. Under the statutes and regulations in effect prior to the enactment of FLPMA, the historic use of the individual who had been grazing on the Federal range would be a factor to consider in the adjudication of conflicting applications, but it would not have been conclusive. Since the passage of FLPMA, however, it is our view that the prior holder has an absolute right of first refusal so long as he maintains his preference right and is otherwise in compliance with the applicable regulations.

Thus, we conclude that, until such time as partition occurs, Platt has a priority right to lease the Federal range involved herein. We are not unmindful that the provisions of sec. 402(c) may, at times, work an injustice upon certain individuals. But it seems clear that Congress has determined that stabilization of the *existing* livestock industry should receive the highest consideration. We feel that this Board has no option but to follow that policy decision. Upon partition, of course, BLM should re-examine the rights of the parties in accordance with the views expressed in *Trask* and the instant case.

Inasmuch as our resolution of the above question renders moot the other issues presented by this appeal, we will not address those questions.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed are reversed and the

case files are remanded for further action consistent with the views expressed herein.

JAMES L. BURSKI,

Administrative Judge.

WE CONCUR:

NEWTON FRISHBERG,

Chief Administrative Judge.

FREDERICK FISHMAN,

Administrative Judge.

DOUGLAS E. HENRIQUES,

Administrative Judge.

EDWARD W. STUEBING,

Administrative Judge.

ADMINISTRATIVE JUDGE

THOMPSON DISSENTING:

I must disagree with the conclusion in the majority opinion that sec. 402(c) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1752(c) (1976), mandates renewal of a lease for the entire grazing privileges in these circumstances where a common owner is seeking to reassert her rights and her co-owner no longer has the control over her interest in the land which had been used as the preference for the grazing privilege.

This precise issue has not been addressed before by the Board or in any other ruling of which I am aware. Thus, as this is a case of first impression, we must view the statutory provision to determine statutory intent not only from the spe-

cific language but from the entire legislative and administrative milieu from which it arose. There is no guidance in the legislative history to the type of situation presented here. See the discussion in *Allen R. Prouse*, 32 IBLA 311, 315, 84 I.D. 874, 876 (1977), showing the Congressional concern that existing grazing operations continue so long as the authorized user remains qualified under the law and regulations. Nor is there any evidence on the specific question here in the current regulations. The implementing regulation echoes the statutory language, providing:

Permittees or lessees holding expiring grazing permits or leases shall be given first priority for receipt of new permits or leases if:

(1) The lands remain available for livestock grazing in accordance with land use plans (see subpart 4120);

(2) The permittee or lessee is in compliance with the regulations contained in this part and the terms and conditions of his grazing permit or lease; and

(3) The permittee or lessee accepts the terms and conditions to be included in the new permit or lease by the authorized officer.

43 CFR 4130.2(e), published July 5, 1978, 43 FR 29072.

In commenting on the final rule-making wherein the grazing regulations were revised last year, the Assistant Secretary stated in the preamble to the regulations:

Serious concern was expressed in several of the comments about how these grazing regulations will affect the livestock operators now authorized to graze on the public lands administered by the Bureau of Land Management. Livestock

operators with a grazing license, permit, or lease will be recognized as having a preference for continued grazing use on these lands. There [*sic*] adjudicated grazing use, their base properties, and their areas of use (allotments) will be recognized under these grazing regulations.

43 FR 29058 (July 5, 1978). While this comment reflects the statutory priority for renewal, it relates that "preference" to the past determinations concerning the grazing user's base properties, among other matters.

Thus, to determine what preference existed, we turn to the basic statutory provision which established the base property preference. For lands outside grazing districts, grazing privileges are awarded under the authority granted by sec. 15 of the Taylor Grazing Act, 43 U.S.C. § 315m (1976), which gives preference to:

* * * owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands; except, that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of land contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary. [*Italics added.*]

This preference, of course, was further delineated by sec. 402(c) of FLPMA by affording a priority to the holder of an expiring lease. What is evident in the entire statutory and regulatory framework,

however, is a recognition of rights established by virtue of ownership or control of base property. For sec. 15 leases, the base property is the contiguous land. Although a purpose of the Taylor Grazing Act and sec. 402(c) of FLPMA is to stabilize existing grazing operations, the underlying assumption in both Acts as to preference and priority for a lease is that the original conditions which afforded the preference right remain the same, *i.e.*, that the applicant retain his ownership or control of the base property. Thus, the priority under FLPMA for renewal depends upon the continued ownership or control of the base property as was recognized in *Mark X. Trask*, 32 IBLA 395 (1977), where it was held that if the holder of an expiring lease loses control of the private property contiguous to public land which gave him a preference right to a lease under 43 CFR 4121.2-1(d) (1977), he would not be entitled to first priority under FLPMA for receipt of a new lease. It follows that loss of a percentage of the ownership or control over the base property causes a loss of the priority to lease to that same extent.

We would apply the law to harmonize with the entire statutory and regulatory scheme of leasing based upon preference land ownership or control. Thus, we would rule that sec. 402(c) of FLPMA gives a priority to lease to expiring lessees only to the extent that the lessee retains ownership or control of the preference lands upon which the lease was

formerly granted. If the lessee loses a percentage interest in a tenancy in common on such preference lands, he would only have a priority to lease based upon the percentage of ownership or control he retains.

The majority opinion interprets sec. 402(c) of FLPMA to a logical absurdity. This may be demonstrated by considering the perimeters of the logic flowing from the majority's conclusion. Under *Trask* if a grazing lease applicant no longer owns or controls land contiguous to the public land to be leased, he or she would not have the statutory preference to that land under sec. 15 of the Taylor Grazing Act. However, so long as a lessee owns or controls any percentage interest in the contiguous land he would prevail under the majority's theory. Thus, where a lessee, whose lease is expiring, had 100 percent ownership or control of the contiguous land upon which the preference was based when the prior lease issued and loses control over 99 percent interest in the contiguous lands, but retains a 1 percent interest in a tenancy in common, the thrust of Platt's argument and the majority's conclusion in this case would compel a ruling that sec. 402(c) of FLPMA requires that the lease be renewed. Any other tenant in common of the preference lands would be prevented from ever acquiring a Federal grazing lease so long as the tenant in common who held the prior lease owns any percentage interest in those lands. This is completely contrary to the entire statutory scheme

relating the stabilization of the livestock industry to the ownership or control of contiguous lands for grazing leases. The majority's conclusion will compel tenants in common to partition lands in order to attain a grazing lease. However, this may not even afford them a basis for relief unless upon partition the cotenant with the lease no longer owns lands contiguous to the Federal lands.

To be in compliance with the rules and regulations so as to be entitled to priority for renewal, the former lessee must meet the essential qualification to "own or control land or water base property." 43 CFR 4110.1-2. Furthermore, there must have been compliance with the terms and conditions of the lessee's lease. The grazing lease which Platt desires to renew incorporated the regulations then in effect when the lease issued. At the times Platt's Federal lease issued and expired,¹ a regulation expressly provided that a grazing lease "will be terminated in whole or in part because of loss of control by the lessee of non-Federal lands that have been recognized as the basis for a grazing lease." (*Italics added.*) 43 CFR 4125.1-1 (i)(4) (1970-1977). Platt's lease from Garcia was used by him to support his prior preference right to a lease. When that lease terminated, without renewal, Platt lost control to the extent of the one-third undivided interest in the base

property owned jointly by Platt and Garcia. Since one of the lease terms was termination of the lease in whole or in part because of loss of control of the base lands, it cannot be said that the lease was in good standing at the time of its termination as to the one-third interest which had been lost by Platt. As against Garcia, Platt is therefore not entitled to assert the priority otherwise accorded under FLPMA to those in compliance with the terms and conditions of the expiring Federal lease.

I would agree with the majority to the extent it finds that an interest in a tenancy in common gives ownership or control to such land. This is in accord with the general common law principles governing tenants in common where each co-owner may use and enjoy property owned in the form of tenancy in common as if he were the sole owner provided his actions do not prejudice the use and enjoyment of the property by the other co-owner, *E.g.*, *Jackson v. Low Cost Auto Parts, Inc.*, 25 Ariz. App. 515, 544 P. 2d 1116, 1117 (1976). Nevertheless, under the rule in *Jackson* a tenant in common cannot exclude other co-owners from enjoying their equal privileges, since to do so would be an "ouster." The majority's conclusion, however, fails to give recognition to any rights in the cotenant to share in the usage of the common tenancy base property and helps Platt, in effect, to oust Garcia from her rights appurtenant to the base property. To avoid this Department

¹ Platt's Federal lease was effective Feb. 14, 1974, and it expired Feb. 13, 1977. His lease from Garcia terminated Oct. 1, 1975.

being a participant to such a result, we should apply the regulation to recognize the ownership interests which the cotenants have in the undivided whole interest in the property by recognizing their proportionate shares.

Platt contends, however, that Garcia has no control over base property because under the rule in *Grabbert v. Schultz*, 12 IBLA 255, 80 I.D. 531 (1973), full control must be recognized in the majority interest. In *Grabbert* the base land had originally been patented to a corporation and when it was dissolved many small undivided interests in the land were distributed to the shareholders in proportion to their holdings. One of the conflicting applicants attempted to obtain from the small percentage holders leases which were merely permissive in nature. On its facts, *Grabbert* is distinguishable from the situation here. However, to the extent language in that case may be read to require over 50 percent interest in a tenancy in common before any rights may be recognized in the cotenant, I would overrule it to that extent. Such a rule is not consonant with the principles of law pertaining to tenancies in common.

The concept of a cotenant's basic qualification of ownership or control in base lands should not be confused with the concepts applicable to proper allocation of the Federal lands. Although we would hold that Platt's ownership and control of the base property for the purpose of his basic qualification and his

priority for renewal of his grazing lease should be in proportion to his percentage of interest in the tenancy in common, this does not mean necessarily that he is entitled to a lease simply for two-thirds of the Federal lands. Since Garcia was not the holder of an expiring Federal grazing lease, she has no priority for a new lease under FLPMA. However, assuming she is otherwise qualified, as the owner of a percentage interest in contiguous lands she is an owner of base property and would have a preference under sec. 15 of the Taylor Grazing Act to lease contiguous lands except to the extent she is precluded by Platt's FLPMA priority for a lease based on his two-third's interest in the base property.

To the one-third interest to which Platt does not have the priority to lease under FLPMA, we thus have conflicting preference applicants. Generally, in such circumstances the grazing privileges for that interest should be allocated in a manner consistent with the criteria set forth in 43 CFR 4110.5, which applies when more than one qualified applicant applies for livestock grazing use of the same public land. The authorized officer may allocate grazing use consistent with land use plans on the basis of any of the following factors:

(a) Historical use of the public land (see sec. 4130.2(d));

(b) Proper range management and use of water for livestock;

(c) General needs of the applicants' livestock operations;

(d) Public ingress and egress across privately owned or controlled land to public lands;

(e) Topography; and

(f) Other land use requirements unique to the situation.

Platt contends that if there is to be any allocation of the privileges it should have been done by the range manager applying similar criteria. We agree with Platt that generally this is true and should have been done in this case. However, there is now an additional factual circumstance which may be given consideration under criterion (f) above, that is, the pendency of the partition suit. Extensive land use planning and evaluation of all these criteria may be postponed where it appears that a probable change in land ownership is imminent. Thus, temporary leases for less than 10 years are justified under sec. 402(b) of FLPMA in the best interest of sound land management where such a change in land ownership by partition is imminent. However, we believe all of these considerations should have been weighed before an allocation was made here, and would modify the decisions below and remand the case to the authorized officer to make a further determination of proper allocation and the reasons therefor.

The foregoing discussion is predicated upon an assumption that Garcia is qualified for a lease because she is in the livestock business. The issue of her qualifications was one of the primary reasons for

our ordering a hearing in this case. Being in the livestock business continues to be a mandatory qualification under current regulations. 43 CFR 4110.1. Platt correctly contends the fact that Garcia had engaged in the business prior to 1961 bears no relevance to the adjudication of her application under appeal because Garcia's lease of her interest and other evidence indicates that she was not engaged in the grazing business from that time at least until her refusal to renew Platt's lease. See *Laurence A. Andren*, 7 IBLA 14 (1972); *Orin L. Patterson*, 56 I.D. 380 (1938). Platt points to several Departmental decisions in support of his argument. The Department has held that the ownership of a few livestock may not be sufficient to establish a person as being engaged in the livestock business. See *Ralph E. Holan*, 18 IBLA 432 (1975); *Ruth E. Han*, 13 IBLA 296, 80 I.D. 698 (1973). We have held that entry into the livestock business cannot be contingent upon the award of a Federal lease. See *Ralph E. Holan, supra*; *George T. McDonald*, 18 IBLA 159 (1974).

The cited cases may be distinguished from the instant case, among other reasons, in that the appellants therein never established that they had entered the livestock business before final Departmental action on their applications. Final action on Garcia's application has been stayed pending this appeal, see 43 CFR 4.21, and her application remains pending before the Depart-

ment. Nothing precludes consideration of all the applicant's circumstances while an application is pending, and Judge Morehouse's findings support the conclusion that Garcia met this qualification at the time of the hearing. It is clear that her entry into the livestock business was not contingent upon the award of a Federal lease. *Ralph E. Holan, supra*; *George T. McDonald, supra*. This tends to show that Garcia had, at least, started a livestock business, albeit a small beginning, when she filed her application. We would find that she is qualified.

Platt further contended that Garcia should not be awarded any grazing privileges without first requiring her to make any compensation to Platt for his improvements on the Federal range prior to the award of the lease. Judge Morehouse ruled that this could await the outcome of the partition action. Platt contends this was erroneous. The statutory basis for such compensation is provided in sec. 4 of the Taylor Grazing Act, 43 U.S.C. § 315c (1976), which provides in part:

No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a *prior occupant* until the applicant has paid to such *prior occupant* the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive. [Italics added.]

While this provision pertains to lands inside grazing districts, it has been provided that sec. 15 grazing

leases (which are outside grazing districts) are to be administered under the provisions of the Taylor Grazing Act, *see* 43 U.S.C. § 315m-2 (1976), and hence, the provision should be applicable to leases as well. Present grazing regulations require payment for improvements by a transferee prior to approval of the transfer of grazing use, regardless of whether the use arises under a lease or permit. *See* 43 CFR 4120.6-5.

The difficulty here is that if the privileges are awarded for joint use as they were below on a percentage basis use of all the Federal range in conflict, there would be no "prior occupant" as contemplated by the Act. Although Garcia's livestock might have some use of the improvements, so would Platt's. Thus, Platt would certainly not be entitled to reimbursement for all the reasonable value of improvements which he is using or may use in the future. If, however, an allocation of the range would preclude his usage of the improvements from a given area, we would agree that provision for some compensation for such improvements should be a prerequisite before a permanent lease should issue to another.

To conclude, we would rule here that Garcia is qualified to hold a lease, that Platt has a priority to lease only to the extent of two-third of the base property he owns in common with Garcia, that there should be an allocation of the other one-third privileges between Platt and Garcia in accord with 43 CFR 4110.5, and that consideration of

compensation for improvement should be made if warranted upon a reallocation of the privileges, in accord with the discussion above, and that further issues raised by Platt but not answered by the decision below or this decision should be entertained by the District Manager upon a remand of the case to accord with these views.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

JOSEPH W. GOSS,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

APPEAL OF ANDY'S EXCAVATING IBCA-1236-12-78

Decided September 19, 1979

Contract No. CX-9000-8-0144,
National Park Service.

Denied.

1. Contracts: Construction and Operation: Labor Laws—Contracts: Disputes and Remedies: Termination for Default: Generally

When a contractor failed to furnish the number of laborers required under a service contract and failed to cure such deficiency after a notice to show cause why the contract should not be terminated for default, the Board held that termination for default was proper and further held that the Government should continue to withhold earnings under the contract to satisfy first the wage claims by unpaid employees of the contractor as

determined by the Department of Labor pursuant to the Service Contract Act of 1965 and secondly to satisfy any claim for excess costs by the contracting agency.

APPEARANCES: Mr. Anderson Jones, Owner, Andy's Excavating, Seattle, Washington, for appellant; Mr. Arthur V. Biggs, Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This is a timely appeal from a termination for default. Neither party elected a hearing and the appeal is submitted on the record.

Findings of Fact

A service contract, No. CX-9000-8-0144, was awarded by the National Park Service to Andy's Excavating on Aug. 24, 1978. The contract required the contractor to furnish an estimated 1,200 hours of labor to place, fill with rock, and tie approximately 300 gabions on the bank of the Nisqually River in the Mount Ranier National Park at Longmire, Washington. At a labor cost of \$17.14 per hour, the estimated 1,200 hours of labor established a contract price of \$20,568. The contract included the General Provisions for Service Contracts, Form 10-293, April 1970, of which Article 10 is the standard default clause (Appeal File Exh. 1).

Change Order No. 1 extended the contract completion date from Oct. 12, to Dec. 1, 1978, but made no change in the contract price (Appeal File Exh. 6).

Andy's Excavating commenced work on Aug. 29, 1978, and by Oct. 12, the originally scheduled completion date, had furnished 636.5 hours of labor and earned \$10,909.61. The Government retained 10 percent of the amount earned and paid Andy's a total of \$9,818.65 (Appeal File Exh. 8).

Although the contract called for the contractor to furnish four or five laborers and one labor leader to perform the contract work (Appeal File Exh. 1, Specifications, p. 8) only two employees remained on the job after Sept. 30, 1978 (Appeal File Exh. 8).

On Nov. 3, 1978, the Contracting Officer sent a notice to show cause why the contractor's right to proceed should not be terminated for default for the failure to furnish the required number of laborers. The notice also pointed out that the employees who continued to work had not been paid since Oct. 2, 1978, and if the contractor continued to ignore his obligation to pay his employees, the monies due under the contract would be withheld to cover the wages earned by his employees and the nonpayment of wages would be reported to the Department of Labor as required by the contract. The return receipt for certified mail (Postal Service Form 3811) shows that the Notice to Show Cause was delivered to the

contractor on Nov. 7, 1978 (Appeal File Exh. 9).

On Nov. 22, 1978, the Contracting Officer notified the Department of Labor of the nonpayment of wages and of the intention to terminate the contract for default (Appeal File Exh. 10). The Department of Labor responded by letter of Nov. 29, 1978, stating that it was conducting an investigation and anticipated finding substantial violations of the Service Contract Act of 1965, *as amended* (41 U.S.C. §§ 351-358 (1967)). Pursuant to sec. 3 of the Act, the Department of Labor requested that all monies available for accrued earnings due to Andy's Excavating be withheld pending a determination of the wages owed to the employees (Appeal File Exh. 11).

As of Nov. 15, 1978, the last day work was performed under the contract, the two employees of the contractor who remained on the job had completed 274 gabions (Appeal File Exh. 17). Completion of the work on the 274 gabions was accomplished with a total of 1,004.5 hours of labor, or an average of 3.66 hours of labor for completion of each gabion.

On Dec. 18, 1978, the Contracting Officer terminated the contract for default pursuant to Article 10, Default, of the General Provisions of the contract. In addition to terminating the contractor's right to proceed, the Contracting Officer withheld all monies due under the contract pending a determination by the Department of Labor of the amount of wage claims of the un-

paid employees. Further, the Government reserved all rights and remedies provided by law or under the contract as well as its right to charge excess costs for the completion of the work called for in the contract (Appeal File Exh. 12).

Pleadings

On Dec. 22, 1978, Andy's Excavating filed notice of appeal from the findings of the Contracting Officer, stating that the two employees were not working for it after Sept. 30, 1978 (Appeal File Exh. 13).

In a letter of complaint dated Jan. 12, 1978, appellant alleged that the work under the contract was complete on Sept. 30, 1978, and that it had been paid \$9,818.65 and requested that it be paid the balance of the contract price of \$20,568 (Appeal File Exh. 14). The Government's answer admitted that appellant had received payment of \$9,818.65 but denied that appellant completed the contract work on Sept. 30, 1978, or at any other time. The Government alleged that appellant defaulted by failing to furnish the required number of laborers to perform the contract work.

Decision

The record shows that appellant had performed only 476.5 hours of labor by Sept. 30, 1978 (Appeal File Exh. 8), while the contract estimated that 1,200 hours would be required to place, fill with rock, and tie 300 gabions (Appeal File Exh. 1). Although the record does not

disclose how many gabions were completed on September 30, it is possible to estimate that only 130 gabions were completed on that date (476.5 hours divided by 3.66 hours per gabion). Appellant's assertion that the work under the contract was completed on Sept. 30, 1978, is contrary to the evidence of record. Appellant can have no reasonable expectation that he had completed the contract for 300 gabions when he had performed less than half of the required work by Sept. 30, 1978.

Appellant's allegation that the two employees who remained on the job after Sept. 30, 1978, were not working for him is refuted by evidence of record that the total of payments under the contract, \$9,818.65, included payment for 80 hours of labor by those two employees for the period Oct. 2 through Oct. 13, 1978 (Appeal File Exh. 8). Further, statements by the two employees show that they were working for appellant until Nov. 15, 1978, and that each of them is looking to appellant for payment of 33 days' wages which had not been paid (Appeal File Exh. 20).

Even with the additional labor by the two employees during the period from Sept. 30 through Nov. 15, 1978, the total number of gabions completed was 274, leaving 24 more gabions to be placed, filled with rock, and tied in order to complete the work required by the contract.

[1] The Board finds that the contract was not completed on

Sept. 30, 1978, that Andy's Excavating did not furnish the required number of laborers after that date to finish the contract work within the contract period and that there remain 24 gabions to be completed in order to satisfy the contract requirement for 300 gabions. The Board further finds that appellant's default was brought to his attention by the notice to show cause, that appellant took no action to cure the default, and that the default termination was authorized under the default clause of the contract.

With respect to the monies withheld, the Comptroller General of the United States has held as a matter of law that where, as here, sums are withheld from a defaulted contractor pursuant to the provisions of the Service Contract Act of 1965, *as amended*, 41 U.S.C. §§ 351-358 (1976), priority to the withheld funds shall be accorded first to the claims of unpaid employees and secondly to the claims of the procuring agency. Unpublished Opinions B-161460, May 25, 1967 and B-170784, Feb. 17, 1971. Accordingly, the Board finds that the Government is properly withholding the remainder of the earnings under the contract pending a determination by the Department of Labor of the wage claims of the unpaid employees and pending a determination by the National Park Service of its claim, if any, to excess costs for completion of the unfinished work.

Conclusion

The appeal is denied.

G. HERBERT PACKWOOD,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

KNIFE RIVER COAL MINING CO.

43 IBLA 104

Decided September 24, 1979

Appeal from decision, GS-10-Mining, of the Acting Director, U.S. Geological Survey, establishing the basis for computing the royalty on production from Federal coal lease BLM (ND) 019127.

Affirmed.

1. Coal Leases and Permits: Royalties
In determining the amount of royalty due to the United States under a Federal coal lease, it is proper for U.S. Geological Survey to include the amount of the reclamation fee imposed by the Surface Mining Control and Reclamation Act of 1977 as part of the gross value of production where the selling price received at the point of shipment to market is increased by that amount.

APPEARANCES: Joseph R. Maichel, Esq., Bismark, North Dakota, representing Knife River Coal Mining Co.

OPINION BY
ADMINISTRATIVE JUDGE
BURSKI

INTERIOR BOARD
OF LAND APPEALS

In Oct. 7, 1977, Knife River Coal Mining Co. requested an opinion

from the U.S. Geological Survey (GS) as to whether the reclamation fee required by the Surface Mining Control and Reclamation Act of 1977¹ should be considered a part of the gross value of coal for computing the royalty under Federal coal lease BLM (ND) 019127.

On Dec. 6, 1977, the Area Mining Supervisor responded by a letter-decision. The decision compared the reclamation fee to a state severance tax which GS has earlier determined must be included in the value basis, which determination had been affirmed by this Board in *Knife River Coal Mining Co.*, 29 IBLA 26 (1977). The Area Supervisor accordingly held that royalty should be paid based on a value which included the reclamation fee. Knife River then appealed to the Director, GS.

On Nov. 1, 1978, the Acting Director, GS, affirmed the decision of the Area Mining Supervisor. After reviewing the GS rationale as to in-

clusion of the severance tax,² he concluded:

The reasoning supporting the inclusion of the severance tax in the royalty base is equally applicable here. The fact that the IBLA decision involved a state tax rather than a federally imposed fee is a distinction which does not call for the application of different legal principles.

Nothing in this decision is meant to indicate that the surface mining reclamation fee is a tax. We decide only that the economic effect of increasing the selling price by the amount of the fee is no different from the effect of an increase attributable to a tax or other cost of operation.

The lessee's appeal to the Director, U.S. Geological Survey, is hereby denied. Knife River appeals from this decision.

The only issue for consideration is whether the reclamation fee

² The GS analysis as quoted in *Knife River Coal Mining Co.*, *supra* at 28, is as follows:

"If the forces in the market place determine that the value of the leasehold production at the point of shipment is no more than the 'selling price' prior to the imposition of the severance tax, the producer absorbs the severance tax in the same way that he absorbs all other increases in his operating costs.

"When the producer absorbs the tax, the Federal lessee continues to compute the royalty due the United States on a basis that is not less than the 'selling price' in effect prior to the imposition of the severance tax.

"Should the forces in the market place demonstrate that the value of the leasehold production at the point of shipment is actually more, than the 'selling price' prior to the imposition of the severance tax the purchaser may recognize that higher value by absorbing part or all of the severance tax in the form of an increased payment, i.e. an increase in the 'selling price' for the production from the leasehold.

"When the purchaser recognizes by an increase in the 'selling price' the higher value of the leasehold production, the lessee is required to compute the royalty due the United States on the basis of that higher value, i.e. a Federal lessee must compute the royalty due the United States on a basis which is not less than the increase in the 'selling price.'"

¹ On Aug. 3, 1977, Congress enacted the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, 91 Stat. 445, 447 (codified at 30 U.S.C. § 1201 (Supp. I 1977)). Sec. 402 of the Act requires all operators of coal mining operations subject to the provisions of the Act to contribute to a reclamation fund. Specifically, sec. 402(a) provides:

"(a) All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less."

30 U.S.C. § 1232(a) (Supp. I 1977).

should be included in the gross value for purposes of computing the royalty due to the United States on a Federal coal lease. The pertinent part of the royalty clause of the lease reads as follows:

(2d) *Royalty.* To pay the lessor a royalty of 5 percent of the gross value of the coal mined hereunder at the point of shipment to market, such point of shipment to be the mine or preparation plant as the case may be, but in no event will the royalty be less than 15 cents on every ton of 2,000 pounds of coal mined for the first 10 years and not less than 17½ cents on every ton of 2,000 pounds of coal mined for the remainder of the second 20-year period of the lease. The lessee agrees that the Secretary of the Interior, for the purpose of determining the royalties due hereunder, may establish reasonable minimum values for the minerals mined, due consideration being given to the highest price paid for a part or a majority of the production of coal of like quality produced from the same general area, the price received by the lessee, posted prices, and other relevant matters. Royalties shall be payable quarterly within 30 days from the expiration of the quarter in which the coal is mined.

Appellant argues that the reclamation fee adds nothing to the value of the coal and that, therefore, the addition of the fee to the basis for computing the royalty results in a windfall profit to the United States. Appellant also contends that since the reclamation fee did not exist when its coal lease was executed, the parties to the lease did not contemplate such a fee would be included in the value basis for computing the royalty.

However, appellant has failed to focus properly on the impact of the reclamation fee on the selling price

of the coal. As appellant notes, value for the purpose of royalty computation is generally equated with gross price. See 30 CFR 211.63(b). This is what the parties contemplated and the U.S. Geological Survey decision does not change that relationship. Whether the producer considers the reclamation fee in setting his selling price or not, the royalty is still based on value as determined by that selling price. If the producer recovers the amount of the fee from the purchaser, the purchaser has, in effect paid additional consideration for the coal, increasing the price to him, and thus the value for computing the royalty must also increase by that amount. While appellant phrases the question as whether the reclamation fee should be included in the gross value for purposes of computing royalty, the real question posed by appellant is whether the reclamation fee should be *subtracted* from the gross value which appellant obtains. Thus, if after imposition of the reclamation fee appellant continues to sell the coal at the previous price, there is no increase in the royalty paid to the United States. If, on the other hand, appellant passes along the reclamation fee to its customers, either through an increase in the selling price, or by a direct rebate of the reclamation fee, the United States is properly compensated for the increased value receiver. By attempting to diminish the price which is actually received by the amount of the reclamation fee, appellant is attempting to

September 25, 1979

diminish what is clearly the gross value received by subtracting what is properly part of the cost of production.

We agree that the rationale of *Knife River Coal Mining Co. supra*, applies in this case and hold that GS correctly concluded that the reclamation fee becomes a part of the gross value of the coal for royalty computation when the selling price is increased by the amount of the fee.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JAMES L. BURSKI,
Administrative Judge.

WE CONCUR:

FREDERICK FISHMAN,
Administrative Judge.

NEWTON FRISHBERG,
Chief Administrative Judge.

APPEAL OF C.I.C. CONSTRUCTION CO., INC.

IBCA-1190-4-78

Decided September 25, 1979

Contract No. YA-511-CT7-94, Bureau of Land Management.

Denied.

1. Contracts: Disputes and Remedies:
Burden of Proof—Rules of Practice:
Appeals: Burden of Proof—Rules of Practice: Evidence

An appellant will be held to have failed to sustain its burden of proof and the appeal will be denied where appellant's case is submitted on the record without a hearing and the record consists only of claim letters and pleadings alleging that the contracting officer's findings of fact and decision are erroneous in certain respects. Disputed allegations do not constitute evidence and cannot be accepted as proof of facts.

APPEARANCES: Mr. Leo P. Bergin, Attorney at Law, McDonald, Carano, Wilson, Bergin & Bible, 241 Ridge Street, Reno, Nevada, for appellant; Mr. Edward F. Bartlett, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

The appellant herein, C.I.C. Construction Co., Inc. (CIC), entered into a construction contract on July 13, 1977, with the Bureau of Land Management (BLM) with respect to the Post Camp Road Surfacing project in Lassen County, California, about 10 miles south of Ravendale. The work to be performed consisted of excavating, loading, hauling, grading, and compacting approximately 5,000 cubic yards of aggregate with all related work and appurtenances. CIC was to furnish all labor, supervision, equipment, and supplies. Aggregate material was to be furnished at

a stockpile by the Government. The contract price was for about \$19,600. The contract provided that the work "shall be started within 10 calendar days after receipt of notice to proceed." (AF-2.)¹

CIC acknowledged receipt of the notice to proceed on Aug. 2, 1977 (AF-5).

During the performance of the contract, CIC, on Aug. 17, 1977 (AF-6), Aug. 29, 1977 (AF-9), and Jan. 12, 1978 (AF-18), made various claims alleging that certain expenses outside the contract had been wrongfully imposed upon the contractor by the Government. By his Findings of Fact and Decision, dated Mar. 6, 1977 (AF-20), the Contracting Officer denied each of the claims presented stating his reasons for each denial. In that decision the Contracting Officer advised CIC of its right of appeal to this Board.

By letter dated Apr. 6, 1978, the attorneys for CIC inaugurated an appeal to this Board setting forth five separate claims (AF-21). This document, captioned "Notice of Appeal," was received by the Board on Apr. 17, 1978. On May 16, 1978, the Board received another document dated May 12, 1978, and also entitled "Notice of Appeal," which set forth six separate reasons why the Contracting Officer's findings of fact and decision of Mar. 6, 1978, were claimed to be erroneous.

On the same day, May 16, 1978, the Board sent a letter to CIC's attorneys explaining that it had re-

ceived both Notices of Appeal and stated, "It may be that you intended the latter 'Notice of Appeal' to constitute the appellant's Complaint. If so, it is requested that you confirm that that was your intention." No such confirmation was ever received by the Board. An order, entitled "Establishing Time for Government to Answer," was issued by the Board on June 2, 1978. In that order the Board stated that although the appellant had failed to file any document designated "Complaint" within the time allowed by the Board's rules, the two notices of appeal, together with the appeal file documents, appear to define the issues involved in the appeal. The Government was then required to file its Answer within 30 days from the date of receipt of the order. It did so on June 29, 1978.

Issue was directly joined by the allegations of CIC and the denials of the Government in its answer with respect to the following items:

1. Whether the method of measuring material hauled employed by the Government inspectors during the first 3 days of the contract performance wrongfully increased the truck time of CIC by 25 percent causing an increased cost of \$4,850.

2. Whether the erroneous figure of 18 miles instead of 26 miles as designated on a map in the specification entitled appellant to an additional \$7,529.34 or whether, as contended by the Government, appellant had knowledge of the actual mileage prior to submission of its bid.

¹For purpose of this opinion (AF-2) refers to Item 2 of the Appeal File.

September 25, 1979

3. Whether a 3-day delay was caused by the inspectors upon completion of the job causing extra costs for appellant of \$500 per day or \$1,500.

4. Whether appellant is entitled to \$500 for alleged inconvenience and added costs in lost time and telephone calls resulting from Government's mishandling of cattle-guard and sign replacement items.

5. Whether CIC was damaged by BLM inspectors because of wrongfully informing employees of alleged misconduct on the part of appellant on previous jobs.

6. Whether appellant was unnecessarily required to have roller equipment on the job prior to commencement of work resulting in an extra cost of \$1,500.

No request for hearing was made by appellant. In July 1979, the Board was informed by counsel for both parties during telephone conversations that they did not desire an evidentiary hearing and would submit their respective cases on the record. Consequently, on July 24, 1979, the Board issued an "Order Settling Record" which stated that this appeal would be considered ready for decision as of Aug. 17, 1979, that either of the parties could supplement the record prior to that time with any document deemed relevant and material and that the parties could submit briefs prior to that time.

Neither of the parties supplemented the record in any way and neither submitted a brief. The appellant has offered no documentary

or testamentary evidence of any kind whatsoever in support of its allegations.

Decision

When a contractor attacks the validity of a finding of fact or decision of a Contracting Officer which is not patently in error, he has the burden of producing evidence showing that he is entitled to relief on the basis of claims made. The Board here is faced with the same problem presented in deciding *Wickes Engineering & Construction Co.*, IBCA No. 191 (Nov. 30, 1960), 61-1 BCA par. 2872, where the Board, at p. 14,981, said:

We are confronted with a problem of proof in this claim since there has been no hearing and the appeal is submitted only on the record. It must be appreciated that this Board must rely upon evidence, whether of record or by testimony, to arrive at a decision. The appellant has not submitted proof, but has only made allegations. The burden of proof is upon the appellant. In the absence of evidence to the contrary, the Board must accept the record or testimony submitted by the Government as being correct unless it, on its face, shows error or is unbelievable. Statements in claim letters are not sufficient proof of essential facts which are disputed.² [Footnotes omitted]

² See also, *Okland Construction Co., Inc.*, IBCA No. 871-9-70 (Mar. 23, 1971), 71-1 BCA par. 8766, where this Board, among other things, at p. 40,686, said: "Mere allegations do not constitute proof"; and *H. W. Caldwell & Son, Inc.*, IBCA No. 824-2-70 (May 30, 1973), 80 I.D. 345, 73-2 BCA par. 10,069 where the Board said, at p. 47,231: "This Board has held that mere statements in letters and assertions in appellant's complaint cannot be accepted as proof of facts."

Accordingly, we find that appellant has failed to sustain its burden of proof. The appeal is denied.

DAVID DOANE,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

APPEAL OF RECON SYSTEMS, INC.

IBCA-1214-9-78

Decided *September 25, 1979*

Contract No. 68-03-0293, Environmental Protection Agency.

Sustained.

1. Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Allowable Costs—Contracts: Construction and Operation: Changes and Extras

Under a CPFF contract requiring the completion of a report with on-going monthly Government review of completed portions by a small number of reviewers, the withholding of such review until a postcontract period and a significant expansion of the number of reviewers is found to constitute a change not subject to the specified cost ceiling. In the circumstances presented, the knowledge that the project office had greatly expanded the work of incorporating reviewers' comments into the contract report was imputed to the contracting officer.

APPEARANCES: Mr. Norman J. Weinstein, President, Recon Systems, Inc., Somerville, New Jersey, for appellant; Mr. Richard V. Anderson,

Government Counsel, Cincinnati, Ohio, for the Government.

OPINION BY
ADMINISTRATIVE JUDGE
LYNCH

INTERIOR BOARD OF *CONTRACT APPEALS*

This is an appeal from the Contracting Officer's decision disallowing \$12,482 of overrun costs under a cost-plus-fixed-fee contract. An additional amount of \$567 remains unpaid under the contract, for which the Government accepts liability. The appellant advised the Board in a letter of Nov. 20, 1978, of its continued willingness to accept less than full reimbursement, a position communicated to the Government on various occasions. The facts discussed below are not disputed by the parties. However, the Government denies liability for the reason that the appellant failed to give timely notice of an overrun under the "Limitation of Cost" clause of the contract and failed to secure approval for expenditures above the contract amount.

Findings of Fact

Appellant was awarded the instant contract on June 22, 1973, for the preparation of a report updating an existing report on municipal scale incineration processing technology. The work was required to be completed within 7 months, with appellant submitting monthly progress reports together with drafts of

chapters completed during the month. The Government Project Officer was to comment on the draft chapters and return them to appellant within 30 days. The contract contemplated that the Project Officer would secure the review of draft chapters by appropriate personnel in the Office of Solid Waste Management Programs (OSWMPO), and collect their comments for return to appellant within the 30-day period. The initial contract included an estimated cost of \$47,721 plus a fixed fee of \$3,779 for a total amount of \$51,500. The Contracting Officer was located in Cincinnati, Ohio, and the Project Officer having technical supervision over contract performance was located in Washington, D.C.

Modification No. 1 dated Jan. 24, 1974, extended the period of performance from 7 to 10 months. Modification No. 2 dated Apr. 23, 1974, changed the contract completion date to Dec. 1, 1974, and designated a new Project Officer to monitor performance. By letter dated May 21, 1974, the Project Officer advised appellant that he and another staff member had reviewed the chapters submitted to date, but that such piecemeal review had not proven successful in the past. He further advised that he planned to wait for the complete draft report before securing the review of four outside reviewers, and asked appellant to suggest other responsible reviewers to be used.

By letter dated Aug. 22, 1974, appellant advised that an overrun of \$16,413.51 was anticipated. The fact that an overrun was anticipated was communicated in earlier letters of May 20 and Aug. 13, 1974, but the specific amount had not yet been determined. By letter dated Oct. 8, 1974, the Project Officer advised appellant to either forward all data compiled and partially completed work or agree to complete the work at no additional cost to the Government. Subsequent exchanges of correspondence culminated in an offer by appellant by letter of Nov. 20, 1974, to complete the work on a "fixed price direct professional salary basis only" for an increase in cost of \$6,987. The negotiations included agreement on a revised schedule of completion of the work by June 1, 1975, and the fact that final typing would be done by the Government. Both the increase in cost and the new completion date were incorporated in Modification No. 3 dated Dec. 2, 1974. The Modification increased the estimated cost by \$6,987, but made no mention of the basis for reducing the amount of the overrun, and did not change the other terms of the contract. By letter dated Feb. 13, 1975, appellant forwarded the remaining draft chapters which completed its work, except for making the changes resulting from review by the Government.

By letter of Aug. 13, 1975, appellant responded to a letter of July 28, 1975, from the contract specialist in Ohio to the effect that the

contract was not yet ready to be closed out because the review of the final report had not been received from the Government. Appellant's letter of Oct. 10, 1975, directed to the Cost Review and Policy Branch in Washington, D.C., with a copy to the Contracting Officer in Cincinnati, advised that an increase in overhead rates had occurred, and that billings at the contract ceiling rate of 100 percent would result in an overrun.

By letter of Oct. 22, 1975, the Project Officer forwarded the draft report to appellant with the comments of a 25-member review team, and asked for its return by Nov. 10, 1975, for final typing by the Government. After advising of the impracticality of completing by Nov. 10, 1975, in a letter dated Oct. 31, 1975, appellant completed the corrections and returned the report by transmittal letter of Jan. 23, 1976. Appellant's letter of Apr. 26, 1976, detailed overrun costs of \$12,443.57 and offered to waive payment of the added overrun costs for a total claim of \$5,983.15. Follow-up letters of Aug. 11, Oct. 7, Nov. 26, 1976, and Mar. 14, 1977, elicited no response from the Contracting Officer.

By memorandum dated Nov. 16, 1977, the contract specialist in Cincinnati requested the project office in Washington, D.C., to advise whether funds would be available to cover the cost overrun. The response of the project office on Nov. 28, 1977, advised that there are no funds available to cover the overrun. By letter dated Dec. 2, 1977, the Contracting Officer proposed

closing out the contract with the payment of the unpaid balance of \$567, without funding the overrun. The failure to fund the overrun was attributed to the failure of appellant to give timely notice that the contract costs would exceed the contract funding as required by the "Limitation of Costs" clause. Appellant refused to accept the proposed settlement of the contract, and subsequent discussions did not result in agreement. The Contracting Officer issued a final decision on Sept. 7, 1978, from which this appeal was taken.

Decision

In its brief, the Government relies primarily on the failure of appellant to give timely notice of an impending overrun despite the fact that the contract audit revealed the contract cost ceiling was reached with the payment of the Apr. 3, 1975, voucher. Government counsel notes that appellant failed to keep either the Contracting Officer or the Project Officer informed with respect to its cost experience during the period Feb. 13 to Oct. 22, 1975, the time period during which the Government review of the draft report was taking place. The appellant did affirm to the Contracting Officer in a letter dated Dec. 16, 1977, that no costs were incurred during this period.

Additionally, the Government argues that the Contracting Officer has the authority to refuse to fund an overrun retroactively whether or not the contractor gives

timely notice of an anticipated overrun. Pointing to appellant's prior experience with an overrun on the contract, it contends that appellant's cost system was adequate to alert appellant to the pending overrun and the need to give notice. Regarding the Oct. 10, 1975, letter to the Cost Review and Policy Branch (with copy to the Contracting Officer) advising of an overrun, the brief notes, "Although a copy was furnished to the Contracting Officer in Cincinnati, Ohio, no notice was given to the project officer, Mr. Steve Hitte in Washington." The brief also concludes that appellant became a volunteer when it continued performance in incurred costs after its cost ceiling had been reached, and that the Government did not induce continued performance.

Appellant claims that the added costs over the contract ceiling were necessarily incurred to complete the contract work by incorporating the comments of the 25- to 40-person review team during a period long after the contract performance time had expired.

Although both parties have dealt with the excess costs as an overrun in their negotiations and in the pleading before the Board, we find that the circumstances giving rise to the additional costs should properly be viewed from a different perspective. The case was presented to the Board without a hearing, with the President of appellant's firm filing the pleadings. While appellant treated the costs as an overrun, the

factual presentation indicated that the underlying basis of appellant's argument is that he was required to do more work than was required by the contract and that the Government's inordinate delay in reviewing the draft report caused such added work to be more costly because it was performed in a later time period.

From the commencement of performance of this contract, it is clear that the manner of performance described in the contract was not to be followed. The monthly review and correction of chapters specified in the contract was changed by the Government to a single review of the complete draft report. In this change appellant concurred. However, at the time of the first overrun, the only evidence of record regarding contemplated Government review is the letter of May 21, 1974, from the Project Officer. That letter indicated the magnitude of the review would be the Project Officer, another staff member, and four outside reviewers. The record does not reveal the evolution of the Government review from six persons to the actual review that took place involving 25 to 40 persons and consuming the time from Feb. 13 to Oct. 22, 1975. The greatly expanded review and review period is not reflected in the contract or any of the modifications. Appellant's contention that the expanded review resulted in more work because of a greater volume of comments to be reconciled is not disputed. We find that the expanded review with the

resulting greater volume of comments to be dealt with by the appellant was a change in the scope of the contract. The "Limitation of Cost" clause limits the expenditures under the contract for the specified scope of work, but does not apply to changes for which an equitable adjustment to the contract amount should be determined. (*See Chemical Construction Corp.*, IBCA 946-1-72 (Feb. 8, 1973), 73-1 BCA par. 9892 and citation in footnote 11).

The Government's contention that appellant should have provided a copy of the Oct. 10, 1975, letter giving notice of an overrun to the Project Officer as well as the Contracting Officer advocates a reversal of roles. The contractor does not have the duty to coordinate the various Government offices involved in different aspects of monitoring contract performance. Appellant had submitted the final draft report on Feb. 13, 1975, and exhausted the contract funds. It incurred no further costs until the Government returned the report in late October for incorporation of the reviewers' comments. Prior to incurring any added costs, appellant advised the Cost Review and Policy Branch and the Contracting Officer that an overrun would be incurred. The Contracting Officer is the responsible official of the Government who can bind the Government by his acts and by his failure to act. He had knowledge that the contract funds were exhausted by reason of a copy of the Oct. 10, 1975, letter sent to him by appellant. At that time, no addi-

tional costs were being incurred: but they would be incurred if the Government were to ask for additional work.

The record is devoid of any evidence indicating that the Contracting Officer took any action regarding the contract from the time of the October 10 notice until after all work had been completed and the appellant submitted his claim in April 1976. We must assume that he did not communicate with the project office to learn the status of the contract work (*i.e.*, a substantial amount of work remained to be done to incorporate the reviewers' comments). Had he done so, undoubtedly, he would have learned that the Government review phase of the work had grown extensively over that contemplated in the contract. With the knowledge that the funds were exhausted, and with the prior knowledge that a shortage of project funds had resulted in extensive negotiations to partially fund an earlier overrun, the Contracting Officer apparently failed to act to acquaint himself with the current status of the contract work. In addition to the Oct. 10, 1975, notice of exhaustion of the contract funds, appellant had advised a contract specialist on the staff of the Contracting Officer, by letter dated Aug. 13, 1975, that the contract was not ready to be closed out because of the work remaining to be done after the Government review of the draft report was received. Taken together, these communications to the office of the Contracting Officer during a

hiatus in the work, placed in Government on notice that additional work was required to complete the contract work and that the contract funds were not sufficient to pay for the remaining work.

Under these circumstances, even though the appellant did not recognize and present a claim for the work as changed, the Contracting Officer had only to act on the information timely provided to him to learn that the project office had, in fact, changed the scope of the contract by greatly expanding the review of the draft report. In this postcontractual period, when the contract specialist on the Contracting Officer's staff writes to the contractor regarding closing out the contract and the contractor responds that the work is incomplete because of the Government tardy return of the review comments, no inquiry was made as to the notice of the problems being encountered. We find therefore that the failure of the Contracting Officer to act on the information provided him imputes to him the knowledge of the actual status of the changed contract requirements.

In the agreement embodied in Modification No. 3, appellant clearly undertook to forego reimbursement of a portion of his overhead costs and to share in the cost of completion of the project. Appellant has repeatedly advised the Government and the Board that only partial reimbursement is claimed for the completion of the contract work which we have found to constitute a change. Therefore, the ap-

peal is sustained in the amount claimed for direct costs of \$5,983.15 plus interest to be determined by the Contracting Officer in accordance with Clause 22 entitled "Interest."

RUSSELL C. LYNCH,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

CARBON FUEL CO.

1 IBSMA 253

Decided September 25, 1979

Appeal by the Office of Surface Mining Reclamation and Enforcement from a Jan. 12, 1979, decision by Administrative Law Judge Tom M. Allen vacating a notice of violation and accompanying civil penalties issued for failure to remove topsoil and to post perimeter markers. (Docket Nos. CH 9-1-R, CH 9-3-P, and CH 9-6-P.)

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Topsoil." For purposes of the topsoil removal requirements of 30 CFR 715.16(a), topsoil is either all the A horizon or the A horizon plus unconsolidated material to a depth of 6 inches or all unconsolidated material where less than 6 inches of material exists.

2. Surface Mining Control and Reclamation Act of 1977: Topsoil: Alternative Materials

An operator must obtain approval from a state regulatory authority before using alternative materials instead of removing, segregating, and redistributing topsoil.

APPEARANCES: Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia, Shelley D. Hayes, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for appellant, Office of Surface Mining Reclamation and Enforcement; Gregory R. Gorrell, Esq., Jackson, Kelly, Holt, and O'Farrell, Charleston, West Virginia, for appellee, Carbon Fuel Co.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed that part ¹ of

¹ The ALJ's decision also vacated Violation No. 5 of Notice of Violation No. 78-I-16-1, Violation No. 1 of Order of Cessation No. 78-I-16-2, and the \$2,250 civil penalty based on Violation No. 1 of the cessation order, all relating to perimeter markers (30 CFR 715.12(c)). OSM has elected not to appeal this part of the decision. It is in this part of the opinion that the ALJ discusses the question whether the Department should be equitably estopped from enforcing a provision of the initial regulatory program on the grounds that the Director of OSM, in a Sept. 3, 1978, letter to the Director of the West Virginia Department of Natural Resources, stated that the State's Aug. 14, 1978, regulations "are essentially in compliance with, and adequate to implement the initial regulatory program." Carbon Fuel's equitable estoppel argument is inapposite to the issue appealed because the letter did not address the matter of topsoil handling and because, in any event, the letter was written *after* the event Carbon Fuel suggests should have been precluded by it. *Cf. Union Carbide Corp. v. Andrus*, No. 79-2142 (S.D. W.Va., July 17, 1979) (order denying preliminary injunction) at 32-35.

a Jan. 12, 1979, decision by Administrative Law Judge (ALJ) Tom M. Allen which vacated Violation No. 7 of Notice of Violation No. 78-I-16-1 and the resulting \$1,200 civil penalty issued for Carbon Fuel Company's Aug. 29 1978, failure to remove topsoil before any drilling for blasting, mining, or other surface disturbance.²

As the ALJ's opinion states, the facts of this case are not in dispute. Because topsoil was sparse on the steep slopes of its mine in Kanawha County, West Virginia, Carbon Fuel removed topsoil only from hollows and other areas where it was encountered rather than removing it continuously as the first, separate step of its contour haul-back operation.³

In pertinent part, the ALJ's decision reads:

Although the word "topsoil" is used liberally throughout the Act and regulations, there is no definition for topsoil either in the Act or in the interim regulations. The thrust of the Act is therefore that the A horizon should be removed, stockpiled, and stored to be replaced on disturbed areas or enough material below the A horizon to comprise a total of 6 inches, the purpose being that the drafters considered this to be the proper material for revegetation when the mined area has been returned to approximate original contour. * * *

Although in West Virginia the quality of the A horizon soil is insufficient for the intentions of the Act, the use of the word topsoil in the regulations must be held to be synonymous with A horizon materials * * *.

From the evidence, it is clear that Respondent has failed to carry the initial

² 30 CFR 715.16(a).

³ Tr. at 14-16, 35, 52, 66-67, 73.

burden of proof to sustain this violation, and the weight of the evidence shows that there was insufficient topsoil in the area being mined on the date of inspection that could be recovered and stockpiled.

Further, since the regulatory authority of West Virginia has apparently recognized the problem with topsoil on the permit area as evidenced by the inspection reports by not citing the Applicant for violations of the stockpiling requirements after May 3, it is evident that the regulatory authority has given its approved [sic] for the haulback and recovery method being used by the Applicant which did not include stockpiling of topsoil unless it was encountered by the Applicant. * * *

If there is any violation of 30 CFR 715.16 by the Applicant, it is one of technicality caused by the geographical anomalies of the West Virginia mountains not contemplated by the drafters of the Act and the regulations and not a negligent act of design or purpose.

For this reason, I am unwilling to hold Applicant in violation of 30 CFR 715.16 on August 29, 1978. [4]

[1] The language of 30 CFR 715.16(a) provides that unless approval for the use of alternative materials is obtained from the state regulatory authority an operator must, as an initial, separate operation, remove all of the A horizon⁵ of the topsoil and, where the A horizon is less than 6 inches deep, must remove either a 6-inch layer that includes the A horizon and the unconsolidated material immediately below the A horizon or, if the total available is less than 6 inches, all unconsolidated material. Thus,

⁴ Decision at 9-10.

⁵ "A horizon" is defined under "Soil horizons" in 30 CFR 710.5 as "the uppermost layer in the soil profile * * * in which organic matter is most abundant * * *."

for purposes of 30 CFR 715.16(a), the definition of topsoil is all the A horizon where there is more than 6 inches of A horizon. Where there is less than 6 inches of A horizon, topsoil is either all the A horizon plus unconsolidated material down to a depth of 6 inches or all unconsolidated material if there is less than 6 inches of A horizon and unconsolidated material.

[2] Since it is not disputed that Carbon Fuel did not first remove topsoil from all areas of its operation and did not have approval from the State of West Virginia⁶ for the use of alternative materials⁷ from hollows and others areas, the ALJ's statement that OSM "failed to carry the initial burden of proof" to sustain this violation" is incorrect.⁸

The fact that a West Virginia official may have acknowledged the practicality of Carbon Fuel's topsoil handling methods at the hearing⁹ does not obviate the requirement that Carbon Fuel must-

* "It is * * * undisputed that there was no approval by the regulatory authority for a variation as provided for in 30 CFR 715.16(a)(1) which provides, 'All topsoil shall be removed unless use of alternative materials is approved by the regulatory authority in accordance with subparagraph [sic] (4).'" Decision at 8; Tr. at 73. A general state regulation governing topsoil handling cannot serve as a substitute for this procedure.

⁷ Since Carbon Fuel was not removing any soil from the slopes, but was instead substituting other materials found in the hollows, those materials, regardless of their composition, were "alternative materials" for purposes of 715.16(a).

⁸ See 43 CFR 4.1171 and *Dean Trucking, Inc.*, 1 IBSMA 229, 237, 86 I.D. 437, 441 (1979); cf. 43 CFR 4.1155.

⁹ Tr. at 102-105.

obtain approval from that State's regulatory authority before using alternative materials.¹⁰

Since Carbon Fuel violated 30 CFR 715.16(a), OSM's notice of violation was properly issued. The ALJ erred in excusing Carbon Fuel from compliance with their requirements.¹¹ The decision is therefore reversed and the case remanded to the Hearings Division for determination of whether a civil penalty is appropriate.

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

¹⁰ 30 CFR 715.16(a)(1); *Alabama By-Products Corp.*, 1 IBSMA 239, 243, 246, 86 I.D. 446, 448, 449 (1979). The ALJ was aware of this requirement: "[T]o satisfy the technicality of 30 CFR 715.16(a)(1), there should be written approval by the regulatory authority for a variance." Decision at 10.

¹¹ 30 CFR 710.11(a)(3)(ii) provides: "On and after May 3, 1978, any person conducting coal mining operations shall comply with the initial regulatory program * * *." Cf. *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979).

CLAYPOOL CONSTRUCTION CO., INC.

1 IBSMA 259

Decided *September 26, 1979*

Cross appeals by Claypool Construction Co., Inc., and the Office of Surface Mining Reclamation and Enforcement from the decision of Administrative Law Judge Tom M. Allen, dated Apr. 18, 1979, upholding two cessation

orders issued pursuant to the Surface Mining Control and Reclamation Act of 1977 (Docket Nos. CH 9-9-R and CH 9-22-R).

Affirmed as modified in part, reversed in part, and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Postmining Land Use

Excavation for the purpose of obtaining coal is an activity which may be subject to regulation under the Act, even though that activity may be incidental to a post-mining land use plan.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Findings—Surface Mining Control and Reclamation Act of 1977: Environmental Harm

In review proceedings of cessation orders issued pursuant to sec. 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977, there must be a determination whether the condition, practice, or violation which is the basis for the order is one which creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

3. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"*Permittee.*" The definition of "permittee" adopted by the Secretary for the initial regulatory program in 30 CFR 700.5 includes those persons who fail to obtain a state permit before conducting surface coal mining and reclamation operations regulated by a state.

obtain approval from that State's regulatory authority before using alternative materials.¹⁰

Since Carbon Fuel violated 30 CFR 715.16(a), OSM's notice of violation was properly issued. The ALJ erred in excusing Carbon Fuel from compliance with their requirements.¹¹ The decision is therefore reversed and the case remanded to the Hearings Division for determination of whether a civil penalty is appropriate.

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

¹⁰ 30 CFR 715.16(a)(1); *Alabama By-Products Corp.*, 1 IBSMA 239, 243, 246, 86 I.D. 446, 448, 449 (1979). The ALJ was aware of this requirement: "[T]o satisfy the technicality of 30 CFR 715.16(a)(1), there should be written approval by the regulatory authority for a variance." Decision at 10.

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"*Permittee.*" The definition of "permittee" adopted by the Secretary for the initial regulatory program in 30 CFR 700.5 includes those persons who fail to obtain a state permit before conducting surface coal mining and reclamation operations regulated by a state.

4. Surface Mining Control and Reclamation Act of 1977: Applicability: Enforcement Provisions

The enforcement provisions of the Act and the initial Federal regulatory program are not avoided by the failure of a person to obtain a state permit before conducting surface coal mining and reclamation operations regulated by a state.

APPEARANCES: H. Laban White, Esq., Marsteller, Siegrist & White, Clarksburg, West Virginia, for Claypool Construction Co., Inc.; Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia, Shelley D. Hayes, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Claypool Construction Co., Inc. (Claypool), and the Office of Surface Mining Reclamation and Enforcement (OSM) filed appeals from the Apr. 18, 1979, decision of an Administrative Law Judge (ALJ). In that decision the ALJ upheld Cessation Order Nos. 78-I-3-1 and 78-I-3-3, issued to Claypool under the provisions of sec. 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977 (Act),¹ but found that he

lacked jurisdiction to review Notice of Violation Nos. 78-I-3-15, 78-I-3-18, and 78-I-3-19 because Claypool had failed to obtain a state permit before engaging in the activities which are the subject of these notices.

The findings of the ALJ are not adequate to support his ruling on the cessation orders. Furthermore, we disagree with the ALJ's holding that Claypool may not be treated as a "permittee" during the initial regulatory program because it does not hold a permit from a state agency and that, as a result, the ALJ is without jurisdiction to review the notices of violation issued to Claypool by OSM. Our decision affirms as modified in part, and reverses in part that of the ALJ, and remands the case to the Hearings Division.

Factual and Procedural Background

Claypool is a corporation engaged in excavation and grading activities in the vicinity of Stonewood and Clarksburg, West Virginia. Its shareholders are Ernest R. Claypool (President), William R. McQuaid (Secretary and Treasurer), and Barbara Claypool. Prior to forming Claypool, the first two individuals conducted excavation and grading projects on a partnership basis.

In February 1978, Claypool began operations on property it owns near the Stonewood municipal boundary. This land had been mined previously for coal by sur-

¹ 30 U.S.C. § 1271(a)(2) (Supp. I 1977); P.L. 95-87, 91 Stat. 445, 505 (1977). All further citations to the Act are to the 1977 Supplement of the *United States Code*.

face and underground methods and had become the site of sundry refuse, sink holes, and general aesthetic blight. Claypool says it intends to prepare this area for commercial development (including a trailer park). In the excavation and grading operations it has conducted towards this end, Claypool has searched for and removed pillars of coal remaining from the previous mining activities. An excess of 10,000 tons of coal has been recovered and introduced into commerce during the course of these operations.

To control drainage from orphaned deep mine workings and surface runoff, Claypool has constructed and maintained diversion channels. Otherwise, Claypool has taken no steps to control the hydrological conditions in the area of its operations.

On Oct. 27, 1978, John Mason and Samuel Pettito, Jr., authorized representatives of OSM, inspected Claypool's property and issued Cessation Order No. 78-I-3-1 and Notice of Violation No. 78-I-3-15.² The basis for the order was stated to be that surface coal mining operations were being conducted without a state permit, in violation of 30 U.S.C. § 1252(a), and that this was causing, or could be reasonably expected to cause significant, immi-

nent harm to land, air, or water resources. Four violations of the interim regulations were specified in the notice: (1) failure to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds, in violation of 30 CFR 715.17(a); (2) failure to segregate and stockpile topsoil, in violation of 30 CFR 715.16(a) and (c); (3) failure to maintain a copy of a permit or authorization to operate at or near the mine site, in violation of 30 CFR 715.11(b); and (4) failure to post a mine identification sign at the entrance to the mine site, in violation of 30 CFR 715.12(b). No time was specified in the notice for abatement of violations 2 and 3; violations 1 and 4 were to be abated no later than Nov. 27, 1978.

On Nov. 13, 1978, Mason returned to Claypool's property and observed signs of coal extraction approximately 1,500 feet to the east of the location which was the subject of the October 27 notice and order. On the basis of this inspection, Mason sent three representatives of OSM to serve Notice of Violation No. 78-I-3-18 and Cessation Order No. 78-I-3-3 on Nov. 14, 1978.³ The conditions stated to be the basis for this action were the same as those specified in the October 27 notice and order, except that no violations of 30 CFR 715.11(b) (pertaining to availability of authorizations to operate) or 30 CFR 715.12(b) (pertaining to the post-

² Ernest Claypool was named as the permittee or operator to which the cessation order was directed; Ernest Claypool and William R. McQuaid were named as the permittees or operators to which the notice of violation was directed. The person served with the order was Walter L. Chandler (a Claypool employee); the person served with the notice was William R. McQuaid.

³ A bulldozer operator on the property was served with these documents; he refused to sign them.

ing of a mine identification sign) were listed in the notice. The remedial action required in the notice was that either a surface mine permit application, accompanied by plans for drainage control, be submitted to the state regulatory authority by Dec. 14, 1978, or that the entire disturbed area be backfilled and revegetated by that date.

Also on Nov. 14, 1978, Notice of Violation No. 78-I-3-19 was issued⁴ on the basis of results from laboratory analysis of water samples taken from the site visited by OSM on November 13. This analysis showed a pH level of 4.7 and an iron content of 22 mg/l, in violation of 30 CFR 715.17(a). No time for abatement of these conditions was specified in the notice.

An informal mine site hearing was held with respect to the first cessation order in December 1978.⁵ Claypool waived its opportunity for informal review of the second cessation order. A formal review hearing was conducted on Feb. 9, 1979, at which all of the orders and notices were consolidated for review by the ALJ.

As a preliminary matter in this review proceeding, the ALJ received stipulations, including: (1) that the real party in interest, as applicant for review, was Claypool

Construction Co., Inc., and not William R. McQuaid and Ernest R. Claypool, in their individual capacities; and (2) that Claypool had removed coal from the subject areas without a mining permit from the State of West Virginia.⁶ On the basis of these stipulations and his decision in the case of *Delight Coal Co. v. Office of Surface Mining Reclamation and Enforcement*, Docket No. CH 9-4-P (Jan. 29, 1979), the ALJ determined that his jurisdiction was limited to reviewing the validity of the cessation orders. He upheld these in his decision dated Apr. 18, 1979. Claypool filed a Notice of Appeal from this decision with the Board on May 9, 1979; OSM filed a Notice of Appeal on May 17, 1979.

Issues Presented

The issues presented by the appeals are: (1) whether the activities underlying the orders and notices issued to Claypool constitute "surface coal mining operations" subject to regulation under the Act and provisions of the initial Federal regulatory program; (2) whether the ALJ made sufficient findings in support of his determination that the cessation orders were validly issued; and (3) whether the ALJ properly restricted the scope of his review to a determination of the validity of these orders.

⁴ Ernest Claypool was served with this notice; the record does not disclose the date of service.

⁵ Although the record is ambiguous in this respect, it seems that an on-site, informal hearing did take place concerning Cessation Order No. 78-I-3-1, at least involving William McQuaid and representatives of OSM. See Tr. 210, 233.

⁶ Also, OSM's motion to vacate violations 3 and 4 of Notice of Violation 78-I-3-15 was granted without objection.

Discussion

Claypool argues that its activities which OSM found to be in violation of the Act are not subject to regulation thereunder because (1) the company's coal extraction has been incidental to surface land development and (2) this excavation activity has affected less than 2 acres of land. The first element of Claypool's argument is an incorrect proposition of law; the second is not supported by the evidence before the Board.

[1] At the very core of the activities which are subject to regulation under the Act is "excavation for the purpose of obtaining coal."⁷ Post-mining plans may be determinative of the type of reclamation required under the Act;⁸ they are not determinative of the applicability of this legislation to a particular operation. We need not inquire beyond counsel's stipulation that, in the course of the subject operations, Claypool has mined and introduced into commerce at least 10,451.81 tons of coal to conclude, as did the ALJ, that these operations were "surface coal mining operations."⁹

Sec. 528 of the Act specifies that the provisions of the Act shall not apply to "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less."¹⁰ William McQuaid testified at the hearing that in the area of Pits A and B (the area de-

scribed in Cessation Order No. 78-I-3-1) only 34,500 square feet of surface land had been affected by coal extraction and that in the area of Pit C (the area described in Cessation Order No. 78-I-3-3) only 6,000 square feet of surface land had been affected by coal extraction.¹¹ According to a generally recognized rule of calculation, however, a coal seam thickness of approximately 9.37 feet would be necessary for the recovery of 10,451.81 tons of coal by surface mining methods were the surface disturbance by excavation to be confined to 40,500 square feet (the total surface area said by Mr. McQuaid to have been affected by Claypool's coal extraction).¹² Inas-

¹¹ Tr. 188-90.

¹² See U.S. Department of the Interior (Bureau of Mines), *A Dictionary of Mining, Mineral, and Related Terms* 9 (1968) (entry for term "acre"). This calculation is based on the rule of allowing 1,200 tons of coal per foot (coal thickness) per acre. The estimate of 1,500 tons of coal per foot (coal thickness) per acre is appropriate in the case of "known and dependable areas." *Id.* Using this figure, a coal seam thickness of approximately 7.49 feet would be necessary for the recovery of 10,451.81 tons of coal by surface mining methods were the surface disturbance by excavation to be confined to 40,500 square feet.

These calculations, when considered in the light of the testimony concerning the thickness of the coal pillars mined by Claypool (see n. 13, *infra*), suggests inaccuracy in Mr. McQuaid's testimony concerning the extent of the area affected by Claypool's coal extraction activities. Mr. McQuaid also testified that prior to actual excavation, Claypool did not have accurate knowledge of the location of the coal pillars underlying the areas to be excavated. See Tr. 214-15. It is therefore appropriate for us to conclude, even without regard to these calculations, that some amount of surface area greater than that said by Mr. McQuaid to have actually been underlain by coal was affected by Claypool's search for coal. Such additional areas are part of the area that must be said to have been excavated for the purpose of obtaining coal. See 30 U.S.C. § 1291(28).

⁷ See 30 U.S.C. § 1291(28); 30 CFR 700.5.

⁸ See 30 U.S.C. § 1265(c); 30 CFR 715.13.

⁹ Tr. 7; Decision at 5.

¹⁰ 30 U.S.C. § 1278(2). Language to this effect also appears in 30 CFR 700.11(b).

much as the only evidence of record concerning the thickness of the coal seam that has been mined by Claypool is that it is approximately 12 inches,¹³ we must conclude that Mr. McQuaid's testimony about the extent of the surface area affected by Claypool's coal extraction was inaccurate.¹⁴ We are left, then, with the evidence introduced by OSM to establish a *prima facie* case of the applicability of the Act, which evidence shows that each of the areas described in the two cessation orders was in excess of 2 acres at the times of the issuance of the orders.¹⁵

[2] Despite our rejection of Claypool's argument, we are unable to affirm the ALJ's holding that the cessation orders are valid. This is because there was no determination by the ALJ that all of the requisites of sec. 521(a)(2) of the Act (pursuant to which OSM issued the cessation orders) are satisfied under the facts of this case.

Sec. 521(a)(2) mandates the issuance of a cessation order by OSM

when a Federal inspection discloses that

any condition or practices exist, or that any permittee is in violation of any requirement of [the] Act or any permit condition required by [the] Act, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources * * *. ¹⁶

The ALJ found that OSM's inspections of Claypool's operations disclosed violations of sec. 502(a) of the Act.¹⁷ The ALJ did not, however, address in his decision OSM's statements, set forth in each of the cessation orders, that "the condition, practice, or violation is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources," even though a significant portion of the testimony presented by Claypool at the review hearing was apparently for the purpose of rebutting these statements.¹⁸ We remand this case for a finding by the ALJ to resolve this conflict.

[3, 4] As a final matter we turn to OSM's appeal that we reverse

¹³ Tr. 51.

¹⁴ In arriving at this conclusion we have rejected the findings of the ALJ concerning the extent of the area affected by Claypool's coal extraction, because these findings are evidently based on a misunderstanding of the testimony. Compare Decision at 3 (reference to Tr. 191, 199) with Tr. 191, 199.

¹⁵ See especially Respondent's Exhibit 12-A (Survey of Tracts "A" and "B" prepared by Raymond M. Kowalski, Jan. 31, 1979); Respondent's Exhibit 12-B (Survey of Tract "C" prepared by Raymond M. Kowalski, Jan. 31, 1979). We are obliged to make separate findings with respect to the extent of the area affected by surface coal mining operations for each of the areas described in OSM's cessation orders, because the nature of the two orders indicates that OSM chose to proceed against Claypool with respect to two, distinct operations.

¹⁶ 30 U.S.C. § 1271(a)(2) (Supp. I 1977). This provision is implemented by the initial Federal program regulations at 30 CFR 722.11(a) and (b).

¹⁷ Decision at 2. Sec. 502(a) provides that: "No person shall open or develop any new or previously mined or abandoned site for surface coal mining operations on lands on which such operations are regulated by a State unless such person has obtained a permit from the State's regulatory authority. 30 U.S.C. § 1252(a).

¹⁸ See e.g., Tr. 181-84 (testimony of William R. McQuaid); 248-50 (testimony of Joseph Beymer); 258-63 (testimony of Constance Huffman); 271-75 (testimony of James Richard Claypool).

that portion of the ALJ's decision which expresses his determination:

The Applicant having been ordered to cease any further mining operations on the subject property under the provisions of section 502(a) of the Act and the Applicant having finally ceased mining after the second cessation order, at this point I find that I have no jurisdiction over the remaining notices of violation but will reserve more specific rulings on those notices of violation until the Interior Board of Surface Mining and Reclamation Appeals has ruled on the issue of loss of jurisdiction by virtue of no permit in the case of *Delight Coal Company v. Office of Surface Mining*, Docket No. IBSMA 79-12. [¹⁹]

In our decision in *Delight Coal Corp.*, 1 IBSMA 186, 199, 86 I.D. 321, 328 (1979), we held that "the definition of 'permittee' adopted by the Secretary for the initial regulatory program includes those persons who * * * fail to get a permit from the proper regulatory authority before engaging in activities regulated by a state."²⁰ Having concluded, above, that Claypool has conducted surface coal mining operations, and there being no showing on the record that these operations are not subject to regulation

under West Virginia law,²¹ we hold that Claypool is a "permittee" and may be subject to the enforcement provisions of the Act and initial regulatory program pertinent to those with such status. Accordingly, on remand the ALJ should take any action regarding Notices of Violation Nos. 78-I-3-15, 78-I-3-18, and 78-I-3-19 consistent with this holding.

For the above-stated reasons, the ALJ's decision of Apr. 18, 1979, is:

(1) affirmed to the extent of the ALJ's holding that Claypool has conducted surface coal mining operations which have affected an area sufficient in size to render those subject to regulation under the Act;

(2) modified to reject the ALJ's finding concerning the extent of the area affected by Claypool's operations, which was based on his misunderstanding of pertinent testimony;

(3) reversed to the extent of the ALJ's holdings that the cessation orders were validly issued and that he did not have jurisdiction to review the validity of the notices of violation; and

(4) remanded to the Hearings Division.

Our remand is for a determination whether Claypool's failure to secure a State permit for its activities caused or could be reasonably expected to cause imminent environmental harm to land, air, or

¹⁹ Decision at 5. Concerning this perception of his jurisdiction, the ALJ said further:

"It appears * * * that the Act and regulations apply only to those who have obtained permits to mine coal; and if coal is being mined without a permit, the Government may issue a cessation order and the unauthorized mining must cease or be subject to criminal action as provided in section 518(e) of the Act."

"Upon the cessation of mining activities, there can be found no section of the Act or the regulations which apply to nonpermittees." *Id.* at 6.

²⁰ This holding was based on our reading of the language of the definition of a "permittee" set forth at 30 CFR 700.5.

²¹ Our decisions in *Dennis R. Patrick*, 1 IBSMA 158, 86 I.D. 266 (1979), and *James Moore*, 1 IBSMA 216, 221, n. 3, 86 I.D. 369 (1979), contain a discussion of the meaning of state regulation in this context.

water resources, and for a determination whether the notices of violation issued to Claypool by OSM are valid.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

APPEAL OF NIELSONS, INC.

IBCA-1173-11-77

Decided September 27, 1979

Contract No. N00 C 1420 4856, Bureau of Indian Affairs.

Sustained in Part.

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustments

Where the preponderance of the evidence shows that substantial increased costs were incurred by a highway construction contractor, primarily because Government inspection personnel either failed to calibrate or improperly calibrated the density testing machine used to determine compaction compliance, and it is determined that the contractor is entitled to an equitable adjustment, the Board will adopt the amount for quantum reached by the parties at a negotiated settlement, when dissatisfied with both the Government audit and the quantum computation of the contractor, but satisfied that the negotiations were made in good faith, at arm's length, and by individuals thoroughly familiar with the details of the contract and its performance.

APPEARANCES: Ms. Linda H. Wish, Esq., and Mr. Joseph C. Molina, Attorneys at Law, Ashland-Warren, Inc., Cambridge, Massachusetts, for appellant; Mr. Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

The question presented by this appeal is whether Nielsons, Inc. (Nielsons, sometimes, contractor, and sometimes appellant), is entitled to an equitable adjustment for certain claims arising out of the performance of a construction contract with the Bureau of Indian Affairs (BIA) for construction work on 11.057 miles of road in an area of New Mexico called Washington Pass near Sheep Springs.¹

The contractor presented 28 claims in the total sum of \$875,711.37 to the Contracting Officer (CO). He first agreed to settle the claims for \$450,000 (AF-E),² but

¹ The contract, executed on Standard Form 23, Jan. 1961 edition, was dated Aug. 10, 1972. The original contract price was \$1,402,928. The work to be performed by the contractor was to furnish all labor, equipment, materials, and incidentals necessary for finishing the previously constructed roadbed, the application of special subbase, base course, hot bituminous concrete pavement, and concrete curbing at locations shown in accordance with the plans and specifications.

² References to the record throughout this opinion will be typically abbreviated as follows: Appeal File, Exhibit E—(AF-E);

later, denied them (AF-G), because of a Field Solicitor's opinion (AF-58) to the effect that a Government audit (AF-D) would not permit approval of the settlement for lack of substantiation of the contractor's claimed costs. In the prayer for relief of its Amended Complaint, Nielsons asked for a total of \$838,253 under counts one through nine; or, \$450,000 under count ten (which alleged the settlement agreement and the repudiation thereof); together with interest on the equitable adjustment; 4 percent New Mexico school tax (Gross Receipts Tax) on the equitable adjustment; a time extension of 88 days and relief from liquidated damages; and such other relief to which it may be entitled.

The principal basis for the contractor's largest claims is the charge that the Government improperly conducted density tests of the sub-base and base courses which caused the rejection of work actually in compliance with compaction specifications and which resulted in extra and unnecessary work and increased costs for the contractor.³ Other

bases for the contractor's claims include the following charges: undue delay in the award of the contract; failure by a prior contractor to sufficiently complete its portion of the roadbed to timely permit the contractor to commence work; wrongful assessment of liquidated damages for delays caused by unusually severe weather; failure of the Government to remove snow in the winter of 1972-1973; improper or faulty staking by BIA personnel; wrongful assessment of penalties against the contractor caused by BIA personnel using unreliable gradation tests and wrongfully determining the contractor to be out of compliance with hot bituminous concrete specifications; and failure of the BIA to pay on time in accordance with the terms of the contract.⁴

On the other hand, the Government entered a general denial to the amended complaint, and in its posthearing reply brief, among other things, charges that "the contractor is trying to get 'bailed out' from a job where its performance was woefully poor," and that "the contractor just did not have the necessary equipment, water and manpower to complete the project as anticipated" (Govt. Brief, p. 4). The Government admits that there were heavy rains in October 1972,

correlated with at least 10 sand cone or rubber balloon tests and that the nuclear calibration curves be adjusted in the case of apparent conflict (AF-A, Secs. 299.05 and 304.06, Special Provisions; Tr. II, 124-126, 130; Tr. III, 41-44).

⁴Contractor's Amended Complaint and Claim Basis Outline attached to Contractor's letter, dated Jan. 27, 1975, addressed to the CO (AF-B).

F.N. 2—Continued

Appellant's Exhibit No. 24—(AP-24); Government's Exhibit No. 5—(G-5); Transcript, Volume IV, page 16—(Tr. IV, 16); Transcript Volume II, pages 48 through 59—(Tr. II, 48-59).

³The specific impropriety charged consisted of the failure to properly calibrate a density testing device known as the "Troxler" model which employed what was commonly called the nuclear method of testing density of soils and aggregate materials in order to determine percentage of compaction. The Government testing procedures were governed by the American Association of State Highway Officials (AASHTO) and required that each soil or material tested by the nuclear method be

which delayed the contractor and that the subgrade did not come through the winter very well, and, as a result, when work resumed on the project in May 1973, the moisture in the subgrade made it nearly impossible for the contractor to meet the specifications. It contends, however, that the Government reduced the density specifications for the subgrade from 100 to 95 percent and, even though the contractor expended extra effort in trying to obtain 100 percent of maximum density, the correction of the soft areas was the responsibility of the contractor (Govt. Brief, p. 7; AF-32). In general, the density test failures, the Government contends, were related to the inept operation, unsure direction, lack of proper equipment, and lack of water in processing the road construction materials rather than to erroneous density testing on the part of BIA testing personnel (Govt. Brief, pp. 10, 11). Finally, the Government asserts that if the Board determines in favor of the contractor on the issue of entitlement, the New Mexico Highway Department rates should be applied rather than the Colorado rates in determining the quantum issue with respect to the contractor-owned equipment costs (Govt. Brief, pp. 15, 16).

There were several circumstances involved in this case which made both the presentation and the evaluation of key evidence unusually difficult. Mr. Rolando Cordova, the BIA materials man and testing supervisor, and who was primarily responsible for the calibration and

operation of the Troxler nuclear testing device, was not available to testify at the hearing because of loss of memory resulting from an illness (Govt. Brief, p. 2; Tr. III, 52; Tr. I, 10, 211, 244; Tr. IV, 191, 192). One of the other inspectors, a Mr. Harris involved with the materials testing, died prior to the time of the hearing and his job diary was unavailable. A fire at the BIA office at Shiprock, New Mexico, destroyed several Government records, including Mr. Cordova's records, which were pertinent to resolution of the calibration question (Tr. I, 10, 50-51). Finally, the record is replete with charges, counter charges, and general accusations between BIA personnel and contractor personnel of noncooperation and vindictiveness which reached a point of such bitterness and rancor that the CO felt compelled to remove his Contracting Officer's Representative (COR) from the project for a "cooling off" period.⁵

⁵ Evidence of such conflict, as well as of internal aggravation among BIA contract administration personnel and field personnel, is contained in an undated memo by Fred Edwards, Construction Inspector (AF-25); an undated memo by Robert Manus, Materials Engineering Technician (AF-26); memorandums to CO from Darrell Statham, Project Engineer and COR, dated Aug. 15, 1973 (AF-23) and Sept. 2, 1975 (AF-24); letter dated Sept. 14, 1973, from W. K. Nielson, President of Nielsons Inc., to the CO (AF-28); letter dated Sept. 27, 1973, from C. J. Rickel, Executive Vice President of Nielsons Inc., to the CO (AF-29); memo, dated Aug. 10, 1973, from the COR to the CO (AF-52); wherein, among others, is found the following statements: "Once again I have refused to furnish him [Mr. Nielson] any information that is not required by specifications. If Mr. Nielson intends to place this claim, let him do so with his own information and we will retain ours for our own defense." On Feb. 25, 1974, the CO sent a memorandum to Darrell Statham

However, on Feb. 1, 1977, at the Contracting Officer's office at Gallup, New Mexico, a 3-hour negotiation conference took place between the BIA and Nielsons. Thomas G. Brandt, CO, and W. R. Meier, Area Roads Materials Engineer, represented the BIA. W. K. Nielson, President, and Arnold Hampson, Vice President of Engineering, represented Nielsons. The contractor's claim items were reviewed point by point. Among other things, a resume of that negotiation session (AF-E, Part C) stated that the CO indicated that in the interest of reaching a settlement the Government would consider payment of claim items 1, 2, and 3 in part, and 4, 12, 14, 15, and 24. It also contained the following statements:

It was agreed by all parties that Item 27 relating to completed work not paid has been agreed to by the Government and the Contractor and was no longer a claim issue.

It was agreed that the balance of the claim items were related to density test-

F.N. 5—Continued
clarifying his reasons for having rescinded the COR designation on Sept. 28, 1973, wherein, he mentioned: that during the project there had been "growing evidence of a conflict of wills between BIA and Contractor personnel," at times approaching "a level of bitterness which seemed to threaten the completion of the project"; that he "felt it necessary to provide a 'cooling off' period"; that the action is *no way* was intended to reflect upon Statham's technical or professional competence, nor upon his loyalty to the Bureau; that "I merely felt that this gesture, followed by the winter shut down period would emphasize to the contractor that some similar concession on his part might be effective in restoring good working relations on the job and promoting the successful completion of the project"; and that "You will shortly receive your redesignation as COR on this project and I wish you the very best in what I know will be your earnest effort to see the job to a successful conclusion."

ing and other engineering items on the project. The contractor's representatives presented information from the job superintendent's diary relating to work being performed by engineering personnel assigned to the project. They also presented pictures of various operations and conditions under which the work was carried out, including a reproduction of the pictures of a sign allegedly erected by BIA personnel. They further presented the 10 page attached document entitled "Densities" which is related to the use of the nuclear gauge for density testing.

Following the review of the paper on "Densities" a short recess was taken where Mr. Brandt and Mr. Meier held a closed conference concerning the Government's position in defending the claim. It was jointly agreed between these two parties that the Government's position before a hearing board would be extremely weak in light of the fact that *the BIA's own correlation testing (page 5 of document on densities) confirmed the fact that the contractor was being required to compact to excessive densities for the entire summer of 1973.* It was jointly agreed that they stood to win all or the majority of this claim amount before a hearing board. It was the Contracting Officer's decision that it was in the Government's interest to seek the most favorable settlement possible at this time. [Italics supplied.]

Consultation between Mr. Brandt and Mr. Meier resulted in the conclusion that at least \$450,000 of the claim amount has either been agreed to by the Government or was directly related to the erroneous density testing during the summer of 1973.

Upon resumption of the conference, Mr. Nielson was asked for a value for which he would settle. Mr. Nielson asked for the opportunity to confer with his representative Mr. Hampson. Following a recess for this purpose, the conference resumed and Mr. Nielson presented, in writing, an offer of \$525,000 plus elimination of liquidated damages. The Gov-

ernment counter offer of \$450,000 was accepted by Mr. Nielson.

The meeting was again recess[ed] to allow Mr. Brandt and Mr. Meier to discuss the proposed settlement with Area Road Engineer, Mr. John Benally. Based upon recommendations of settlement in the amount of \$450,000 by Mr. Meier and Mr. Brandt and the facts surrounding the same, Mr. Benally agreed that a settlement was in the interests of the Government. Assistant Area Road Engineer, Mr. Bill Frazier was also present at this meeting.

Upon resumption of the meeting with the Contractor's representative *the figure of \$450,000 was agreed upon by Mr. Nielson and Mr. Brandt.* [Italics supplied.]

Subsequently, on Mar. 11, 1977, the Contracting Officer executed a document entitled "Determination and Findings" (AF-E, Part A). It shows under the Findings portion that, in arriving at the proposed settlement of \$450,000, 11 of the 28 claims were allowed in full, 4 were allowed in part, 11 were denied, and 2 were settled under the provisions of the contract for unpaid items and certain liquidated damages at no cost to the Government, which had the effect of eliminating items as claims items. The Determination portion is as follows:

By authority under General Provisions (Construction Contract) Standard Form 23-A incorporated into Contract No. NOO C 1420 4856 this settlement is approved as satisfactory both to Government and Contractor; therefore a final modification to the contract to reflect \$450,000 in additional costs and 88 days time extension to the contract is in order.

The above-described document was then submitted to the Field Solicitor for legal review. His re-

sponding memorandum, dated May 10, 1977 (AF-58), among other things, pointed out that, while his office from the available factual material may arrive at a different result *as to entitlement* on some aspects of the claim, "*I am not prepared to say the contracting officer's decision is unsupported by any substantial evidence.*" On the matter of quantum, however, the Solicitor reached the conclusion that, based on the report of the audit conducted in July of 1975 by the Department's Office of Audit and Investigation (AF-D), the claimant's records *as presented to the auditors* did not show any increase in cost of performance so as to justify additional compensation. He then rendered the opinion that "the proposed D&F is legally insufficient." (Italics supplied.)

The substance of the testimony of Mr. W. K. Nielson is unrefuted that at the conclusion of the negotiation conference of Feb. 1, 1977, he shook hands with both Mr. Brandt and Mr. Meier; that Mr. Brandt said, "I am glad the damned thing is over," and he said, "I am, too," and Mr. Brandt said, "You will be receiving shortly the necessary documentation in writing"; that later, after several periodic calls about the status of the settlement, during a particular telephone conversation, Mr. Nielson said, "Gee, what has happened to us, where is our thing?" Mr. Brandt responded, "Well, I hate to inform you of this, but I have been overruled by the Field

Solicitor's Office, and we do not have a settlement." (Tr. IV, 219-221.)

Thereafter, in a document entitled "Findings of Facts and Decision by the Contracting Officer," bearing the date of Oct. 3, 1977, the Contracting Officer denied completely the claims of Nielsons, Inc., with respect to both liability and costs (AF-G). This appeal from that decision was filed with the Board on Nov. 8, 1977.

ENTITLEMENT

Discussion

At the outset, we observe that the Contracting Officer erroneously concluded, with respect to entitlement, that he had been overruled by the Field Solicitor's Office. The Field Solicitor, in his memorandum of May 10, 1977 (AF-58), made a point of saying that he was not prepared to say that the Contracting Officer's decision was unsupported by any substantial evidence to support a finding of entitlement. In addition to the admissions of the Government officials contained in the documents relating to the settlement negotiations of Feb. 1, 1977 (AF-E), discussed above, and the statement of the Field Solicitor, we find the following evidentiary items to be persuasive in support of a finding of entitlement:

(1) The testimony of Mr. David I. Floyd, President and Manager and Materials Engineer of the Albuquerque Testing Laboratory, Inc. (Tr. II, 86-148). He is a graduate of the University of New Mexico

with a Bachelor of Science Degree in Civil Engineering and testified to 30 years of experience doing density testing and making compaction curves. He explained the technical meanings of "Dry and wet density," "compaction," and the "Proctor test or curves"; also, that there were three methods of density testing permitted by the specifications for the subject project—the sand cone, the rubber balloon, and the nuclear tests; and that the nuclear test is really not "nuclear," but simply a radioactive measurement. He explained the procedure typically employed on a given project to accomplish the required density testing. He also testified that use of the nuclear test has the advantage of being more rapid than the sand cone test, but would not be dependable unless the *appropriate calibrations of the nuclear testing machine were made with respect to each type of material being tested* because of the variance of chemical composition and other factors; and, that his laboratory made density tests at the subject project at the request of Nielsons, Inc., on Aug. 30, 1973.

(2) The results of the density tests made by the Albuquerque Testing Laboratory on Aug. 30, 1973, and the interpretation thereof in the cover letter, dated Sept. 14, 1973 (AF-B, Ex. A-4). This evidence showed that nuclear gauge measurements for the density of the compacted base course aggregate at the Sheep Springs job were lower than the sand cone measurements of density of the same material, thus

indicating failing compaction tests when the material should have passed.

(3) The testimony of five Government witnesses—Mr. Brandt, the CO, Mr. Statham, the COR, Mr. Meier, Area Roads Material Engineer, Mr. Edwards, Chief Inspector, (Tr. III, 48-49), and Mr. Frazier, Navajo Area Roads Engineer (Tr. IV, 4-5). This testimony was stipulated into the record to save hearing time and was substantially that none of these men had any personal knowledge that the nuclear devices used on the Washington Pass Project were, in fact, correlated by anyone with sand cone or rubber balloon tests; that they had no knowledge of the existence of any documents reporting such correlation tests; and, except for Mr. Brandt, who said he did not know, that it is normal practice to keep records of correlation tests if they are, or were, performed.

(4) The testimony of Mr. Donald J. Kohler, project superintendent on the Washington Pass Project for Nielsons, Inc. (Tr. I, 54-245 and Tr. II, 15-83), and Mr. William K. Nielson, Chairman of the Board of Nielsons, Inc. (Tr. IV, 172-239). The extensive testimony of these two witnesses, among other things, showed: that they had had considerable experience in meeting compaction standards in highway construction; that during the summer of 1973 on the subject project unexplainable difficulty in achieving compaction specification standards was encountered; that they finally

had the Albuquerque Testing Laboratory make some independent density tests, and determined that the Government density testing had been faulty resulting in over compaction of the subgrade, subbase, and base course aggregate; that the contractor had been unnecessarily required to rework much of the work which should have met specification standards; that the delays and extra work thus encountered caused considerable other problems and expense to the contractor; and that after the Government returned to the sand cone method of testing density rather than relying upon the nuclear method, the contractor had little difficulty in complying with compaction specifications.

Decision

Based upon the foregoing admissions and evidentiary items, together with our review of the entire record, we conclude that the weight of the evidence clearly preponderates in favor of the appellant and make the following specific findings of fact:

1. That Government personnel on the Washington Pass Project, during the summer of 1973, either failed to calibrate, or improperly calibrated, the nuclear density testing machine used to determine compaction compliance by the contractor.

2. That as a result of the use of the improperly calibrated density testing machine, many compaction tests erroneously showed the material to have failed causing the contractor substantial increased costs

resulting from among other things, having to reperform subgrade, sub-base, and base work and to postpone the paving work into the next construction year.

Accordingly, the contractor is entitled to an equitable adjustment.

QUANTUM

Discussion

The Field Solicitor's opinion of May 10, 1977 (AF-58), as previously discussed, with respect to the matter of quantum, declared the Contracting Officer's Determination and Findings of Mar. 11, 1977, to be legally insufficient. This opinion was based, however, on the report of the Department auditors to the effect that the claimant's records *as presented to the auditors* did not show any increase in cost of performance so as to justify additional compensation.

Why all of the contractor's accounting records were not presented to the auditors is not entirely clear. However, from the tenor of the overall testimony of the auditors and the contractor's accounting personnel at the hearing, the Board perceives that the apparent conflict of personalities among the various personnel of the contracting parties pervaded the relationship of the auditors and the contractors' accountants. Apparently, the result was a lack of communication which contributed toward a less than complete audit.

The audit report, in our view, was effectively discredited by the testimony and written analysis of

the appellant's expert witness, Mr. Jon H. Knoll, Certified Public Accountant and Manager of the Administrative Services Division of Arthur Andersen & Co. of Seattle, Washington (Tr. VI, 6-60; AP-24). His written analysis was in the form of an 8-page letter addressed to appellant's counsel under the date of Jan. 5, 1979 (AP-24). His comments therein were stated to be based upon: (1) a review of the Department of the Interior audit report and portions of the supporting working papers obtained through discovery proceedings; (2) a review of costs claimed (as submitted to the Bureau of Indian Affairs); (3) a limited review of Nielsons' accounting records; and (4) discussions with counsel and several Nielsons' management personnel. We find substantial support in the record for the conclusions reached in the last paragraph of that analysis which reads as follows:

Based on my review, I believe that the audit report prepared by the D.O.I. Office of Audit and Investigation is of little value in defining the amount of the equitable adjustment due Nielson's, [sic] Incorporated. The audit report implies that to be supportable, the claimed costs must be separately identifiable in the contractor's accounting records. In my opinion, this is an unreasonable requirement and directly conflicts with standard construction industry practices for pricing and negotiating change orders and claims. The audit report includes calculations showing that Nielson's [sic] revenue exceeded costs for this contract and that the contractor had a large "gross profit" on this project. I find these calculations to be incorrect and misleading. The auditors' [sic] derived actual

equipment costs for this contract by allocating "book costs" of equipment based on direct job costs. This calculation ignores many factors which could significantly affect equipment cost and appears to substantially understate the cost of equipment used in completing the contract. In general, I find that the audit report and audit working papers do not adequately support the opinion expressed in the audit report, and the implication that Nielson's, [sic] incorporated is not entitled to the claimed equitable adjustment.

On the page entitled "The Audit Report," in the preface to the appeal file submitted to the Board by the Contracting Officer, the Contracting Officer, himself, was critical of the audit where he stated as follows:

The audit did not approach the claim from a Contracting Officer's point of view in that: 1) It apparently did not take the applicable contract terms and provisions into consideration. 2) There apparently was no review of the contract records such as correspondence, test reports, daily construction reports, or diaries, etc. 3) It relied heavily on the fact that in spite of numerous delays, Contractor's records showed a profit in excess of that anticipated. Contractor did not use the total cost approach and if he can establish that he was in fact delayed and put to extra expense by the Government's acts or failure to act, profit would have no bearing on the Board's decision.

Government counsel also recognized the shortcomings of the Government audit when he said in his brief, on pages 3 and 4:

[T]he audit as performed in 1975 really was not material. That audit was based on the figures originally made available by the contractor. The auditors had no choice but to reach the conclusion they did. They can only work with the figures

as presented and supply sound accounting practices. They had no authority to use ownership rates to establish a claim for the contractor.

It is apparent that the foundation for the opinion—that the Contracting Officer's Determination and Findings of Mar. 11, 1977, with respect to quantum was legally insufficient—has crumbled. We find no such legal insufficiency.

On the other hand, we find the total figure claimed by the contractor, \$838,253, to be unacceptable as an appropriate equitable adjustment. We do not necessarily dispute the correctness of that sum in terms of actual expenditure which may have been made by the contractor, but we are not convinced that the entire amount should be attributed to the actions of Government personnel on the project. The record contains considerable evidence that the contract performance by contractor personnel and management may have contributed to the contractor's unanticipated increased costs.⁶

⁶ For example, Mr. Fred Edwards, Chief Inspector on the project, testified (Tr. V, 52-80), among other things: that there was a shortage of water in most of 1973; that additional water or equipment had been requested on six different dates in 1973; that there had been three deaths on the project as a result of poor signing; and that there were 11 requests for equipment prior to Sept. 27, 1973, and only one after that date. Mr. Darrell Statham, a graduate Civil Engineer and COR for BIA during 1973, testified (Tr. V, 85, 86) that he was the author of Exhibit (AF-28) and that he had no reason to change his opinion of the expressions contained in that document (relating to problems at the Washington Pass Project and dated Aug. 15, 1973). That document, among other things, contains the following comments:

"In my opinion the Contractor has never had enough blading and rolling equipment on

In addition to the attribution problem, we are also concerned about the choice of outside rates applied in the contractor's computation of company-owned equipment costs. The testimony of Mr. Aryol Brumley, Controller and Secretary-Treasurer of Nielsons, Inc. (Tr. III, 55-165), and the contractor's cost summary (AP-5) show that the major cost item in the performance of the Washington Pass Project was company-owned equipment cost totaling \$960,230 and that that figure was determined by applying the Colorado Highway Department Equipment Rates (AP-17) to the number of hours such equipment was used on the project. We are inclined to agree with Government counsel (Govt. Brief, p. 16), that if outside rates must be used, it would seem more appropriate to apply the rates of New Mexico where the contract was performed. The undisputed testimony of Mr. W. R. Meier, Jr., Assistant Area Road Engineer in the Navajo Area, BIA, was to the effect that the Colorado equipment rates were significantly

higher than the New Mexico rates (Tr. VI, 119-139).

We are convinced that, to arrive at an equitable adjustment figure, the circumstances of this case suggest the approach used in the cases of *Ragonese v. The United States*, 128 Ct. Cl. 156 (1954) and *Johnson, Drake and Piper, Inc., and D. R. Kincaid, Ltd., a Joint Venture*, ASBCA 9824 & 10199 (May 26, 1965), 65-2 BCA par. 4868. In the *Ragonese* case, at page 164, the court said:

It seems to us that the recommendation of the consulting engineer for the payment of the amount stated in the Change Order of \$24,145.09, originally concurred in by the construction engineer of the Federal Works Agency, and originally agreed to by plaintiff, comes about as near to the amount to which plaintiff is equitably entitled as any other figure suggested by the record.

In the *Johnson* case, the Armed Services Board said, at page 23,074:

We are satisfied that at Osan there occurred the only bona fide arms length negotiation that ever took place regarding the subject matter of this dispute. The figure there agreed to by the people on the job and intimately familiar with it as fair for the balance of the work to be performed, is persuasive evidence of the approximate measure of an equitable adjustment to which this appellant is entitled.

We see practicality and merit in adopting the figure reached by the representatives of the parties in this case at the settlement negotiations of Feb. 1, 1977. These negotiations appear to have been made in good faith, at arms' length, and by individuals who were thoroughly familiar with the details of the contract and its performance. The con-

F.N. 6—Continued

the Project to keep up with his dumping of special subbase and base material. Usually he has several thousand feet of material dumped daily that he does not process for several days. Dust control on the Project has been a continuous problem. At present he has only one operative pressure spray, and one gravity flow water wagon on the Project. The gravity flow does not meet the base course specifications. The Contractor blended sand in the base course to meet gradation requirement, however, he placed approximately three times more than was required and has now wasted tons of this material (sand) over the road shoulders. He was told that the sand he had windrowed for blending on the Project was too much, but he insisted that we let him try this, which we did; but it did not meet specifications. We have requested he remove this waste on several occasions, but to date he has refused to do so."

feres at the settlement conference were men of considerable experience in highway construction and none seemed fully satisfied with the final settlement figure. This was demonstrated by the testimony of the Contracting Officer, Mr. Brandt, who recalled a telephone conversation he had with Mr. Arnold Hampson of Nielsons, sometime in early Dec. 1978 (Tr. III, 24), relating to the meeting and discussions of Feb. 1, 1977. Mr. Brandt testified that his recollection of the substance of that conversation was as follows:

Well, Arnold said something to the effect that they thought there had been an agreement. They thought that they had probably given in too much, even in terms of the agreement which we tried to arrive at. I said * * * that in a negotiation, if both sides come away thinking they gave up too much, maybe it was a pretty good deal.

The contractor has asked the Board to award interest on the equitable adjustment. However, we find no provision for interest in the contract involved in this case. The contract was executed as of Aug. 10, 1972, and the effective date of the amendment of the Federal Procurement Regulations, 41 CFR 1-1.322, which permitted the award of interest, was Sept. 21, 1972. Consequently, we conclude that we have no authority to grant the interest requested.⁷ Likewise, we know of no

authority, and none was cited, for granting the requested 4 percent New Mexico school tax on the equitable adjustment.

Decision

Based on the foregoing discussion, we conclude that the settlement reached by the parties on Feb. 1, 1977, and reflected in the Contracting Officer's Determination and Findings of Mar. 11, 1977, is a fair and equitable resolution of the quantum issue presented by this proceeding.

Accordingly, we hold that the contractor is entitled to an equitable adjustment of \$450,000 together with a time extension of 88 days and relief from the liquidated damages assessed.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

APPEAL OF KENNEY REFRIGERATION

IBCA-1230-12-78

Decided September 28, 1979

Contract No. 14-08-0001-16742, U.S.
Geological Survey.

Sustained.

1. Contracts: Construction and Operation: Generally—Contracts: Construc-

⁷ See the discussion of the interest question in this Board's decision in *Commonwealth Electric Co.*, IBCA No. 1048-11-74 (July 15, 1977), 84 I.D. 407, 77-2 BCA par. 12,649, on reconsideration, 84 I.D. 867, 77-2 BCA par. 12,781.

tion and Operation: Waiver and Estoppel—Contracts: Disputes and Remedies: Termination for Default: Generally

When the Government could not require delivery of a refrigerated storage unit within the original delivery schedule because the building in which the unit was to be installed was not finished and the Government thereafter continued to negotiate changes in specifications and delivery dates with the contractor, the Board held that the Government had waived the original delivery schedule and that the Government did not regain the right to terminate the contract for default since there was no mutual agreement on a new delivery date and the Government's unilateral attempt to reestablish a specific contractual delivery date was unreasonable as not being within the performance capabilities of the contractor at the time the notice was given.

APPEARANCES: Mr. Eugene A. Kenney, Sr., Owner, Kenney Refrigeration, Ft. Lauderdale, Florida, for appellant; Mr. John McMunn, Department Counsel, San Francisco, California, for the Government.

*OPINION BY
ADMINISTRATIVE JUDGE
PACKWOOD*

*INTERIOR BOARD OF
CONTRACT APPEALS*

This is a timely appeal from a termination for default. Neither party elected a hearing and the appeal is submitted on the record.

Findings of Fact

Contract No. 14-08-0001-16742 was awarded by the U.S. Geological Survey to Kenney Refrigeration on

Sept. 30, 1977. The contract called for Kenney to furnish and install a 1,500 square foot refrigerated storage unit for a firm fixed price of \$24,292. Sec. H of the contract provided for the unit to be delivered 210 days after receipt of a written notice of award and installed ready for use within 15 days after delivery. Sec. H cautioned that the building in which the unit would be installed was not completed at the time of the award of the contract and early delivery should not be attempted without prior clearance (Appeal File Exh. 1).

Kenney received written notice of award on Oct. 4, 1977, which set the delivery date as May 2, 1978, with installation to be completed by May 17, 1978 (Appeal File Exh. 6).

On page 12 of the contract, Kenney had typed the following: "Remittance address: Vollrath Company, Sheboygan, Wisc. 53081, Atten: Kenney Refrigeration Acct." The Vollrath Co. was unwilling to undertake manufacture of the unit without a firm guarantee of payment. On Nov. 3, 1977, Kenney wrote to the Contracting Officer to advise of the position of the Vollrath Co. and to ask if the contract could be modified to insure that the check would be made payable to the Vollrath Co. (Appeal File Exh. 8).

The Contracting Officer responded by letter of Dec. 6, 1977, that pursuant to the Assignment of Claims Act of 1940, *as amended* (31 U.S.C. § 203, 41 U.S.C. § 15 (1976)), assignment of payments due under the contract could be

made only to a bank, trust company, or other financing institution. The Contracting Officer enclosed a copy of the relevant Federal Procurement Regulation and suggested that Kenney investigate the possibility of assigning the payment to a bank and arranging with the bank to distribute the money in a manner agreeable to Kennedy and Vollrath (Appeal File Exh. 10).

During the period from December 1977 through June 8, 1978, the parties discussed certain modifications to the contract (Appeal File Exhs. 11-23). On June 14, 1978, the Contracting Officer sent Kenney two copies of a proposed modification incorporating the agreed-upon changes and extending the time of delivery to Aug. 1, 1978 (Appeal File Exh. 24). The Government was unable to require delivery as originally scheduled since there was a delay in completion of the building in which the unit was to be installed.

Kenney responded by letter of June 23, 1978, that the specification changes contained in the modification were acceptable but declined to accept the proposed time of delivery since the factory was quoting 8 weeks delivery due to a summer rush of orders (Appeal File Exh. 25).

On June 30, 1978, after calling the factory and being advised that the 8 week delivery schedule could not be reduced, the Contracting Officer called Kenney to give verbal approval of the drawings which accompanied Kenney's letter of June 23, 1978, and to request Kenney to

place the order immediately (Appeal File Exh. 26). On July 5, 1978, the Contracting Officer wrote to Kenney to confirm the telephone conversation which approved the drawings and requested Kenney to place the order with the factory (Appeal File Exh. 27). Although it is possible that the intention of the Contracting Officer was to accept an 8 week delivery schedule, neither the notes of the telephone conversation of June 30 nor the confirming letter of July 5 contain any reference to a specific delivery date for the modified unit.

In a telephone conversation on Aug. 31, 1978, the Contracting Officer advised Kenney that the building was nearly finished and asked when the unit would be delivered. Kenney responded that the order to the factory was placed by letter of July 3 and that he would call back with the delivery date (Appeal File Exh. 28). Subsequent telephone calls to Kenney on Sept. 1, 6, 12, 13, 15, and 19 failed to produce any information regarding a delivery date (Appeal File Exhs. 28, 30).

On Sept. 20, 1978, the Contracting Officer wrote to Kenney as follows:

By telephone conversation of June 30, 1978, I provided verbal approval of marked drawings with the understanding that you would place the factory order without delay by forwarding to them one of your copies of the approved drawings. By a later conversation, you indicated that final approval was sent to the factory by your letter of July 3, 1978 and received by them later in the week ending July 7, 1978. Your letter of June

23, 1978 quoted delivery time of 6-8 weeks after receipt of approval by the factory, which would mean a delivery date of September 1, 1978.

You have failed to deliver the contract items within the re-established delivery time and all indications are that such delinquency is not due to causes beyond your control and without your fault or negligence.

The Government has been materially damaged by your failure to make timely delivery. Therefore, you are hereby notified that you have a period of ten days after receipt hereof, either to make delivery of the contract items or to propose an alternate delivery schedule. The Government would expect to negotiate a price reduction as consideration for any extension of time for delivery.

Failure to comply, by delivery or by proposal of an acceptable delivery extension along with reasonable consideration therefor, may result in termination of the contract for default and repurchase against your account. The Government reserves all its rights under the contract and does not, by the issuance of this notice, condone any delinquency.

(Appeal File Exh. 31.)

In a telephone conversation on Sept. 21, 1978, the Contracting Officer learned from Vollrath that production had not been started because Kenney had not made satisfactory arrangements to insure that Vollrath would be paid. Delivery was still quoted as 6-8 weeks from receipt of order (Appeal File Exh. 34).

On Sept. 26, 1978, Kenney responded to the Contracting Officer's letter of Sept. 20, 1978, and denied that a delivery date had ever been reestablished. Kenney proposed a delivery date of 210 days from the Government's July 5 approval of

the modifications to the original contract. Kenney suggested that such delivery date could be improved if payment could be made directly to Vollrath (Appeal File Exh. 35).

By a Mailgram to Kenney dated Oct. 6, 1978, the Contracting Officer terminated the contract for default (Appeal File Exh. 37). On Oct. 12, 1978, the Contracting Officer confirmed the Mailgram with a written Termination for Default and Final Decision of the Contracting Officer. The decision made no finding that a delivery date had been reestablished prior to the Contracting Officer's letter of Sept. 20, 1978, but based the determination that the contractor was in default on Oct. 6, 1978, solely on the fact that receipt of the letter of Sept. 20 by Kenney on Sept. 26 established Oct. 5 as the delivery date for the unit and failure to deliver the unit on that date constituted a failure to make progress such as to endanger completion of the contract by Oct. 20, 1978 (Appeal File Exh. 38).

Discussion

The Government argues that when a contractor fails to carry out the terms and conditions of its contract without legal excuse, it is in default. The Government takes the position that the original delivery schedule was never changed by a formally accepted modification and therefore Kenney's failure to deliver within 210 days from receipt of the written notice of award

placed it squarely in breach of the contract.

The first statement is correct as a general proposition but the reasoning from the general to the specific ignores the fact that the Government was not in a position to require performance according to the original delivery schedule for the very good reason that the building in which the unit was to be installed had not been completed. When the original delivery date of May 2 passed without delivery, the Government did not treat it as a breach but continued to negotiate with Kenney regarding modifications to the specifications and to the delivery schedule. Such actions on the part of the Government constituted a waiver after breach. *DeVito v. United States*, 188 Ct. Cl. 979 (1969).

Under the *DeVito* rule, even though there has been a waiver after breach, time may again become essential and the Government may regain the right to terminate a delinquent contractor for default if (1) the parties bilaterally agree on a new delivery date or (2) the Government unilaterally issues a notice under the contract's default clause establishing a reasonable but specific time for performance on pain of default termination. *DeVito, supra* at 991-92.

With respect to the question of a bilateral agreement on a new delivery date, the Contracting Officer's letter of Sept. 20 attempted to characterize the letter of June 23 from Kenney as an offer of 8 weeks

delivery and the response on July 5 as an acceptance which reestablished the delivery time. Kenney's letter of June 23 merely relayed the factory's estimate of delivery time and the Contracting Officer's response on July 5 merely requested that Kenney place its factory order. We do not regard this exchange as an offer and acceptance of a specific delivery time.

In *DeVito*, the court set forth the procedure which the Government must follow unilaterally to establish a new delivery date and stated: "The notice must set a new time for performance that is both reasonable and specific from the standpoint of the performance capabilities of the contractor at the time the notice is given." (*DeVito, supra* at 992).

It is significant that the Contracting Officer's final decision of Oct. 12 on the default made no finding of fact to show that the delivery time was reestablished by agreement. The propriety of the default must therefore be determined on the reasonableness of the Government's unilateral setting of the delivery date at 10 days from receipt of the letter of Sept. 20.

It appears from the record that both parties were under the impression on Sept. 20 that the unit had been manufactured. If such impression had been correct, 10 days would have been a reasonable time for delivery from the factory. On Sept. 21, prior to receipt of the letter by Kenney on Sept. 26, the Contracting Officer learned that the unit had not been manufactured and that the

factory was still quoting a delivery from 6 to 8 weeks after receipt of orders. As of Sept. 21 the Contracting Officer had knowledge that the 10-day delivery was not within the performance capabilities of the contractor at the time the notice was given and thus the notice failed the requirement of reasonableness laid down in *De Vito*.

Decision

[1] Accordingly, the Board finds that the delivery time was not reestablished by agreement and that the Government's unilateral attempt to reestablish a delivery time was unreasonable and therefore ineffective.

We are constrained to observe that Kenney's continuing insistence that payment be made directly to its supplier is contrary to Clause 8, Assignment of Claims, of the General Provisions of the contract and contrary to the Assignment of Claims Act of 1940, *as amended*, 31 U.S.C. § 203 and 41 U.S.C. § 15 (1976), as cited in the clause (Standard Form 32, Rev. 4-75). If the Government had taken the proper steps to regain the right to terminate for default, Kenney's failure to make satisfactory arrangements to insure payment of its supplier would not constitute an excusable failure to perform. *Midstates Fire Truck Co.*, GSBCE 4837 (Feb. 6, 1978), 78-1 BCA par. 13,012.

Since the Government did not take the proper steps to reestablish a delivery date, there are no benchmarks against which to measure

progress toward completion of the contract. The Board finds, pursuant to Clause 11 Default, section (e), that the contractor was not in default under provisions of the default clause and that the rights of the parties shall be the same as if the notice of termination had been issued pursuant to Clause 31, Termination for the Convenience of the Government. This matter is remanded to the Contracting Officer for determination of what compensable costs, if any, were incurred by Kenney in accordance with Parts 1-8 of the Federal Procurement Regulations (41 CFR 1-8).

G. HERBERT PACKWOOD,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

APPEAL OF L. M. JOHNSON, INC.

IBCA-1268-5-79

Decided *September 28, 1979*

Contract No. 14-20-0500-4452, Bureau of Indian Affairs.

Dismissed.

Contracts: Contract Disputes Act of 1978: Jurisdiction—Contracts: Contract Disputes Act of 1978: Interest

Where a contractor's claim is not pending before the contracting officer on the effective date, Mar. 1, 1979, of the Contract Disputes Act of 1978, the contractor is ineligible, under sec. 16 thereof, to

elect to proceed under the Act. Therefore, an appeal to the Board, involving a claim upon which the final decision of the contracting officer was issued prior to Mar. 1, 1979, and seeking relief pursuant to sec. 12 of the Act, will be dismissed for lack of jurisdiction.

APPEARANCES: Mr. Michael F. Nienstedt, Winston & Cashatt, Attorneys at Law, Spokane, Washington, for appellant; Messers Lawrence E. Cox and Arthur V. Biggs, Co-Department Counsel, Portland, Oregon, for the Government.

*OPINION BY
ADMINISTRATIVE
JUDGE DOANE*

*INTERIOR BOARD OF
CONTRACT APPEALS*

On June 29, 1975, L. M. Johnson, Inc. (contractor, sometimes appellant), of Spokane, Washington, entered into a construction contract with the Bureau of Indian Affairs (BIA), U.S. Department of the Interior, for grading and draining 7.388 miles of Silver Creek Road on the Colville Indian Reservation, Ferry County, Washington. The contract price originally was \$401,543, but was increased by change orders to over \$700,000.

Under the Disputes Clause of the contract, the contractor, on or about Apr. 29, 1977, filed a claim for additional compensation with the Contracting Officer for BIA. After investigation and extensive exchanges of correspondence between the contracting parties, the Contracting

Officer, by his findings of fact and decision dated Nov. 27, 1978, determined that the contractor was entitled to the amount of \$78,226.91 with respect to the submitted claim. The contractor was paid that sum by U.S. Treasury check No. 11,758,439 dated Dec. 28, 1978.

In a letter addressed to the Contracting Officer bearing the date of Jan. 16, 1979, the contractor acknowledged receipt of payment of the claim, but stated:

This check represents the basic entitlement amount (as expressed in L. M. Johnson's letter addressed to the Government of December 22, 1978) and does not reflect the interest due on the above-referenced claim. As such, this check is part payment only of the total amount due. It is being negotiated solely on this basis.

Accordingly, enclosed is our bill for interest which remains due and owing pursuant to our election to proceed under the Contract Disputes Act of 1978. This interest, in the amount of \$12,171.61, has been computed pursuant to Section 12 of the Act.¹

By letter of Feb. 14, 1979, the Contracting Officer advised the contractor that upon receipt of the election to proceed under the Contract Disputes Act (Act), the request for interest had been forwarded to the Regional Solicitor's Office for decision and that the decision allowed interest in the amount of \$1,118.24. A copy of the Solicitor's decision was attached. It was in memorandum form, dated Jan. 31, 1979, and stated in pertinent part:

¹ The Contract Disputes Act of 1978 may be cited as P.L. 95-563, 92 Stat. 2383, 41 U.S.C. §§ 601-613 (1976).

The Contract Disputes Act of 1978 was enacted on Nov. 1, 1978. Section 16 of the Act provides as follows:

"Sec. 16. This Act shall apply to contracts entered into one hundred twenty days after the date of enactment. Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim *pending then* before the contracting officer or initiated thereafter." (Italics added).

Where a contractor elects to have the provisions of the Act become operative to a contract made before this Act was enacted, the words "pending then" are ambiguous with respect to whether the provisions of the Act become operative to claims pending at the "date of enactment" (November 1, 1978) or at the time the contractor's claim was first received (in this case, May 2, 1977). In our opinion this language enables a contractor to elect to have the provisions of the Act apply to such claims as of the date of its enactment rather than at the time the contractor first submitted the claim. Based upon information available to us at this time, we do not believe that Congress intended the interest provisions of this Act to apply retroactively to the time when the contractor first submitted its pending claim, which, in some cases, could conceivably be as long as 10 or 20 years prior to the enactment of this Act. However, by virtue of such election, a contractor can have the benefits of this Act made applicable to a pending claim although generally the Act applies only to those contracts entered into one hundred twenty days after November 1, 1978. Section 12 provides that interest shall be paid on the amounts found due upon the contractor's claim until the claim has been paid. Therefore, we conclude that L. M. Johnson, Inc. is entitled to interest as provided for by the Act only from November 1, 1978, the date of the Act, until the time its claim is paid. * * *

By check dated December 28, 1978, L. M. Johnson was paid the sum of

\$78,226.91 in settlement of its claim. By virtue of its election under the Contract Disputes Act of 1978, L. M. Johnson, Inc. is entitled to interest at the rate of 9 percent per annum on the sum of \$78,226.91 from November 1, 1978 to December 28, 1978 or 58 days. We calculate that the amount of interest due L. M. Johnson, Inc. for this period is \$1,118.24.

On Apr. 18, 1979, counsel for the contractors inquired by letter whether the letter of Feb. 14, 1979, was the final decision of the Contracting Officer on the interest claim. The Contracting Officer, on May 2, 1979, advised that it was. Thereupon a notice of appeal dated May 10, 1979, addressed to the Contracting Officer and received by his office on May 14, 1979, was docketed by the Board on May 30, 1979. The notice of appeal stated that the contractor "appeals to the Board of Contract Appeals from the Contracting Officer's letters and/or decisions of May 2, 1979, and February 14, 1979," and alleged:

The decision is erroneous in its failure to grant interest payments to the contractor from the date [May 2, 1977] the contractor's claim for additional compensation was submitted pursuant to Section 12 of the Contract Disputes Act of 1978. (Public Law 95-563.)

Government counsel filed a motion to dismiss for lack of jurisdiction, June 26, 1979, which stated:

This motion is made for the reason that the sole disputed issue presented in appellant's complaint is its entitlement to interest on a claim pending prior to November 1, 1978. The Federal law under which the claim is made does not permit an award of interest upon such claim for the period prior to the enact-

September 28, 1979

ment of the Contract Disputes Act of 1978, to-wit November 1, 1978.

In the brief, filed by the Government in support of that motion on July 9, 1979, counsel conceded that sec. 16, *supra*, "[A]uthorized appellant to elect to have the interest provisions of Section 12 made applicable to its claim *from the date this legislation was enacted*"; disagreed with the appellant's assertion that interest should be allowed for a period prior to the date of enactment stemming from the date on which the claim was received by the Contracting Officer; and argued extensively that Federal statutes are to be given prospective, rather than retroactive effect. The conclusion was that the interest provisions of the Act do not apply retroactively prior to the date of enactment, and that the Board lacks legal authority and jurisdiction to award interest upon appellant's claim.

The appellant's brief in reply to the Government's motion to dismiss, filed Sept. 5, 1979, relied heavily on the Government's admission that the contractor's election was effective and that the Act and its provisions apply to this appeal. The argument therein was focused on the following three points:

A. That the Board has jurisdiction to interpret and construe the Contract Disputes Act of 1978 and award the interest requested by appellant pursuant to said Act and, therefore, respondent's motion to dismiss should be denied;

B. That the Contract Disputes Act of 1978 provides in clear and unambiguous terms that the Government shall pay interest on claims from the date such claims are filed with the Contracting Officer, not merely from the date of enactment; and

C. That the Contract Disputes Act of 1978 is a remedial and procedural statute making its interest provisions retrospectively effective to claims which proceed pursuant to it.

Decision

Although we agree with the Government that this appeal must be dismissed, we are not willing to do so on the basis presented in its brief. The principal fallacy thereof lies in the failure to have distinguished between the date of enactment (Nov. 1, 1978) and the effective date (Mar. 1, 1979) of the Contract Disputes Act of 1978. In our opinion, the key date for determining whether a contractor has made a valid election under sec. 16 is the effective date of the Act. If the contractor's claim was not pending before the Contracting Officer on that date, Mar. 1, 1979, the contractor is ineligible to elect to proceed under the Act.

We point with approval to the construction of sec. 16, made in the consolidated decision of *Monaco Enterprises, Inc.*, ASBCA No. 23611 and *Towne Realty, Inc.*, ASBCA No. 23676 (June 6, 1979), 79-2 BCA par. 13,944. Those cases were decided pursuant to an inter-

locutory order by the Senior Deciding Group of the Armed Services Board of Contract Appeals on Elections to Proceed Under the Contracts Disputes Act of 1978. The basic rationale for the majority opinion is contained in the following pertinent parts:

The general word "pending" is modified by "then before the contracting officer." As discussed previously, "then" means 1 March 1979. In our opinion "before the contracting officer" refers to claims on which the contracting officer has not yet taken final action by mailing, electronically transmitting, or otherwise issuing his final decision. Extension of the period for pendency of a claim beyond the point at which the final decision is issued strains the meaning of "before the contracting officer" beyond the common ordinary meaning of these words. Absent some legislative history indicating that special meaning of "pending then before the contracting officer" was intended we do not perceive sufficient basis for departing from the ordinary meaning of that text. * * *

We agree with the proposition that the Contract Disputes Act is remedial in nature and should be liberally construed. But Section 16, our present focus, is addressed primarily to setting a time by which the statutory scheme is to be administratively established and ready to operate. There is little basis for a departure from the ordinary meaning of "pending" which, consistent with the statutory scheme, means prior to the issuance of the contracting officer's final decision. Other suggested interpretations tend to be strained, a result to be avoided in the absence of legislative history suggesting such other interpretations.

See also *Bick-Com Corp.*, VACAB No. 1433 (June 19, 1979), 79-2 BCA par. 13,904, where the Veterans Administration Contract Appeals Board, also construing sec.

16 of the Contract Disputes Act, said:

The Act was approved on November 1, 1978, thereby establishing March 1, 1979, as the effective date. The subject contract was executed prior to March 1, 1979, and the claims were not "pending" before the Contracting Officer on that date. In fact, the final decision of the Contracting Officer had been issued and received by the Appellant over three months prior to the date set in the Act as the time at which the appeal provisions could be invoked on claims "pending" before the Contracting Officer. Under such circumstances, the Board lacks jurisdiction to afford Appellant the right to pursue either the new procedures or the expanded remedies covered by the Act.

The undisputed facts in this appeal are that the claim upon which interest is requested was paid on Dec. 28, 1978, and the Contracting Officer's final decision on the claim for interest was issued Feb. 14, 1979. We find, therefore, that no claim of this contractor was pending before the Contracting Officer on Mar. 1, 1979. It follows that the election of the contractor to proceed under the Act was without force or effect. Consequently, we hold that this appeal seeking the remedy provided by sec. 12 of the Act must be dismissed for lack of jurisdiction. It is also clear that the Contracting Officer's decision to award interest in any amount was erroneous, having been based on a misconstruction of sec. 16, as discussed above.

Order of Dismissal

Having determined, as a matter of law, that the election of the ap-

pellant to proceed under the Contract Disputes Act of 1978 is invalid, and that appellant is not entitled to the relief requested under that Act, it is ordered that the appeal be and the same is hereby dismissed with prejudice.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

APPEAL OF NASATKA & SONS, INC.

IBCA-1157-6-77

Decided September 28, 1979

Contract No. 3000-6-1447, National Park Service.

Appeal denied.

1. Contracts: Construction and Operation: General Rules of Construction—Contracts: Performance or Default: Acceptance of Performance—Contracts: Performance or Default: Inspection

When the contractor offers materials which the contracting officer discovers are not in total compliance with the specifications, the contracting officer may accept the material if he finds it to be in the best interests of the Government. That acceptance, however, is not final and conclusive if based on, or induced by, a misrepresentation of a material fact.

2. Contracts: Construction and Operation: Changes and Extras—Contracts: Performance or Default: Acceptance of Performance

Where the Government does not issue a written change order and does not give a verbal order which is interpreted by the contractor as a change, no contract change has occurred and the contractor may submit materials conforming to the original specifications. The Government's mere exercise of its option to accept non-conforming goods does not in and of itself constitute a contract change.

APPEARANCES: Mr. Paul Rhodes, Attorney at Law, Rhodes, Galford & Fraser, Washington, D.C., for appellant; Mr. Ross Dembling, Department Counsel, Washington, D.C., for the Government.

OPINION BY
ADMINISTRATIVE JUDGE
GILMORE

INTERIOR BOARD OF
CONTRACT APPEALS

Background

Contract No. 3000-6-1447 was awarded to appellant, Nasatka & Sons, Inc. (hereinafter referred to as appellant), by the National Park Service pursuant to an invitation for bids issued on Aug. 6, 1976, for the painting of the White House and related work. Bids were opened on Sept. 8, 1976. Appellant was notified by letter dated Sept. 29, 1976, that the contract work was to commence on Oct. 4, 1976, with completion required within 45 days therefrom. The contract was executed on

Standard Form 20, January 1961 edition, and included Standard Form 22, October 1969 edition; Standard Form 19-A, November 1972 edition; Standard Form 19-B, October 1969 edition; Standard Form 23-A, Revised April 1975 edition; and a host of Special Provisions.

The contract specified that the paint to be used on masonry surfaces shall conform to Federal Specification TT-C-555 B.¹ This specification "covers coatings having masonry-like textured finish for application on formed concrete, concrete, concrete block, stucco and brick" (AF Tab N).² Federal Specification TT-C-555 B is a "performance" specification as opposed to a "formula" specification (Tr. I-16).³ Paragraph 3 of Federal Specification TT-C-555 B includes the following relevant provisions:

3.1 Materials. The manufacturer is given wide latitude in the selection of raw materials and process of manufacture, provided that the paint supplied meets the requirements of this specification. Materials shall be of the best quality used in good commercial practice and entirely suitable for the purpose intended under normal conditions of use. The coating shall be ready-mixed and the applied paint shall produce a rough finish which shall completely hide the substrate. The coating shall not contain lead in excess of 0.5 percent by weight of total nonvola-

tile matter. The solvents or solvent system used in the process shall comply with Air Pollution Regulations "Rule 66". A certificate of compliance to this effect is necessary.

* * * * *

3.2.3 Appearance, drying time, and resistance to sagging. The coating shall present a dry, firm, uniformly textured finish after having been applied to a cement asbestos panel at a spreading rate of 50 ± 10 square feet per gallon and allowed to stand in a vertical position for 24 hours at $23 \text{ degrees C} \pm 1 \text{ degree C}$ and 50 ± 4 percent relative humidity. The coating shall show no evidence of sagging, running, wrinkling, or other film defects.

3.2.4 Flexibility. The coating shall show no evidence of cracking, chipping or flaking when tested as specified in 4.4.3.

* * * * *

3.3.1 Moisture Resistance. When tested as specified in 4.4.5, the coating shall show no evidence of blistering, loss of adhesion to masonry, or discoloration.

Under paragraph 4 of Federal Specification TT-C-555 B, the supplier is held responsible for the performance of all inspection requirements specified, with the Government reserving the right to perform any of the inspections where such inspections are deemed necessary to assure that supplies and services conform to the prescribed requirements. The various tests which the paint to be supplied should pass are outlined in the specification.

Prior to the paint's delivery to the site, but after formulation of the paint, Mr. Claffey, the paint salesman for Columbia Coatings Co. (the manufacturer), called Mr. Humphreys, the Project Inspector for the National Park Service, who had been designated as the Con-

¹ Tr. I-8, 16; AF Tab. A, p. 3, par. 1-3.1.

² Abbreviations used: AF—Appeal File Exhibits; TR—Transcript (Volume I or II); G Exh.—Government's Exhibit; A Exh.—Appellant's Exhibit.

³ Performance Specifications require that the material submitted comply with specified standards of performance. Formula Specifications require the material submitted to comply with a specified chemical composition.

tracting Officer's representative, regarding the texture to be supplied, noticing that Federal Specification TT-C-555 B called for a textured coating. Mr. Humphreys, after consulting with Dr. Campbell, the chemist at the National Bureau of Standards, upon whom he relied for technical assistance, informed Mr. Claffey that a sample would have to be applied to the White House for approval of the color and texture. On Oct. 4, 1976, Mr. Humphreys approved the paint for color and texture, the texture being "no texture" (Tr. I-47; Tr. II-13; G Exh. G). Preparatory work at the site commenced on Oct. 4, 1976. By letter dated Oct. 6, 1976, Columbia Coatings Co. submitted its paint certification to appellant's subcontractor, Broadway Decorators, who in turn hand delivered it to Mr. Humphreys on that same day, October 6 (Tr. II-14, 15). The letter certified that the paint to be supplied would meet Federal Specification TT-C-555 B and would have the following formula:

Vehicle-Styrene Butadienne	
[sic] Copolymer Pigment (by weight) 46%	
Titanium Dioxide-----	35%
Zinc Oxide-----	10%
Extenders -----	55%
	<hr/>
	100%
Vehicle 54%	
(Goodyear) Pliolite S5A--	14.75%
Mineral Spirits-----	35.75%
Film Plastisizer-----	14.00%
Hi-Flash Naphta-----	35.50%
	<hr/>
	100.00%

(A Exh. 2).

This certification was submitted by the National Park Service to Dr. Campbell for his recommendations as to whether the paint should be accepted. The paint was delivered to the site on Oct. 8, 1976, (Tr. II-18, 92). Appellant began painting the White House prior to the paint being officially accepted by the Government. Appellant was told, however, that proceeding without the express approval of the paint by the Government would be at its own risk (Tr. II-19, 92).

After the certification had been submitted, but prior to approval of the paint, Mr. Thomas, president of Columbia Coatings Co. (the manufacturer of the paint), called Dr. Campbell to discuss the formula submitted in the October 6 certification. The chemical ingredients set forth in the certification were discussed, specifically as to the performance. Dr. Campbell informed Mr. Thomas in the conversation that based on the certification submitted, the paint was an acceptable one for the job (Tr. I-19).

On Oct. 14, 1976, Dr. Campbell called Mr. Humphreys to advise him that he was satisfied with the formula submitted and recommended that the paint be accepted. On the same day, Mr. Humphreys verbally informed Mr. Sullivan of Broadway Decorators that the paint was accepted (Tr. II-92). By letter dated Oct. 19, 1976, the following comments were submitted by Dr. Campbell to the National Park

Service as a follow-up to the verbal communications regarding the October 6 paint certification:

The material formula proposed for use *does not* meet your specification requirements for the textured coating TT-C-555 B, as it is not a textured coating.

The proposed formula is similar to that described in an older version of the current specification TT-P-97 D, i.e., a styrene-butadiene solvent type paint for exterior masonry surfaces. The solvent requirements do not comply with Rule 66 of the California APCD which are included in the latest version of the specification. However, the titanium dioxide proposed for use stated by the manufacturers [*sic*] representative, Mr. Reilly, to be the rutile type.

Material conforming to the specification TT-P-97 should give adequate performance on exterior masonry surfaces.

The suitability of texture of the surface does involve personal preferences, and this decision as to what texture is most pleasing, should be made by you and your group. [A Exh. 3].

Appellant was not advised of this written communication, Mr. Humphreys having already related these items at the time of acceptance.

The actual painting of the White House went smoothly. The job was substantially completed around Thanksgiving of 1976 with the punch list items completed on Dec. 12, 1976, (Tr. II-30). On Dec. 17, 1976, Mr. Humphreys, while on site, noticed that the paint on the White House had begun to chip and blister. This was approximately 3 weeks after the painting had been completed. Dr. Campbell was called to examine the building (Tr. II-45). After chemical analysis of the paint chips, and the paint from a can left

by appellant, it was found that the paint submitted and applied to the White House was not the same formula as that set forth in the Oct. 6, 1976, certification. Mr. Ralph Ross, the Contracting Officer, sent a letter to the appellant detailing the results of the tests conducted by the National Bureau of Standards. The following reasons were given as to why the paint furnished and applied by the appellant did not meet the contract specifications:

1. The chemical analysis showed the resin to be vinyl toluene acrylate when styrene butadiene was specified.

2. The paint failed a basic flexibility test.

3. The solvent requirements did not comply with Rule 66 of the California APCD.

(G Exh. I.)

The appellant was required to submit a proposal for correction within 24 hours after receipt of the above letter. Appellant commenced repainting of the White House in mid-July 1977 (Tr. I-77). The paint specified for the repainting was the same as that specified for the initial painting, TT-C-555 B. The paint supplied and accepted was certified by appellant to be in conformance with Federal Specification TT-C-555 B without the perlite (texture-producing particles) in the formulation. Appellant was required to perform the repainting at its own expense, which cost allegedly totaled \$22,089.

By this appeal, appellant is seeking reimbursement of that amount from the Government, its claim hav-

ing initially been denied by the Contracting Officer.

Discussion

The terms of the contract required that the paint to be used on exterior masonry surfaces meet Federal Specification TT-C-555 B, which is a "performance" specification. This type of specification gives the manufacturer wide latitude in the selection of raw materials and the process of manufacture, as long as the end product meets the quantitative and quality assurance standards spelled out in the required specification.

At the time the paint was formulated, the manufacturer was cognizant of the fact that the paint was to comply with Federal Specification TT-C-555 B and proceeded with a clear understanding as to the required standards of performance. The manufacturer's president, who has been in the business 30 years, did not interpret the specification as requiring any texture; thus, did not include a texture-producing aggregate, *i.e.*, perlite, when the paint was initially formulated (Tr. I-21). After formulation of the paint, but prior to its delivery on site, a salesman for Columbia Coatings Co., the manufacturer, noticed that the specification called for a "textured coating." He then called Mr. Humphreys to ascertain the kind of texture desired (Tr. I-45). Mr. Humphreys advised him that a paint sample would have to be applied to the White House for approval of texture and color.

Mr. Humphreys approved the paint as far as texture and color were concerned, the texture being "no texture." This approval was made on Oct. 4, 1976 (Tr. II-13).

On Oct. 6, 1976, when the paint certification was submitted, the paint had been formulated by the manufacturer to comply with Federal Specification TT-C-555 B, without the inclusion of texture-producing aggregates. The record shows that a paint meeting the specifications of TT-C-555 B can be formulated without the addition of texturing material (TR II-166). The paint submitted for the repainting of the White House was such a paint.

The appellant was responsible for the performance of all inspection requirements specified in TT-C-555 B (paragraph 4 of Federal Specification TT-C-555 B). On Oct. 6, 1976, when the paint certification was executed, appellant knew or should have known all of the raw materials that went into the paint formulation and also whether or not the paint did, in fact, comply with the required contract specifications.

The Government, upon receiving and reading the certification, had the right to rely on the certification as being an accurate and true representation of the chemical composition of the paint submitted and that such paint conformed to the specification as certified therein.

Mr. Thomas, believing there was some question as to the paint's acceptability, called Dr. Campbell to

discuss the formula set forth in the October 6 certification. At this time the manufacturer knew that "no texture" was being required and never indicated either orally or in writing that he perceived this to be a deviation or change from the original specification or that it would in any way affect his ability to comply with the contract requirements as written.

The October 6 certification indicated that the resin in the paint was Goodyear Pliolite S5A, which is a styrene butadiene resin (Tr. II-127). Dr. Campbell recommended approval of the paint to Mr. Humphreys, the Contracting Officer's representative, based on a finding that the formula submitted was similar to an older version of Federal Specification TT-P-97 B which was a "formula" specification used on exterior masonry surfaces. Mr. Thomas, the manufacturer's president, who had 30 years of experience, knew at the time of his discussion with Dr. Campbell that the formula submitted was being compared to a "97" specification and that it was a "formula" specification (Tr. I-37, 38).

The Government, because of a performance failure only 3 weeks after the application of the paint, analyzed the paint and paint chips in an attempt to ascertain the cause of the failure. Upon examination of the paint, the Government discovered that the paint actually used was not the same formula as the one represented in the October 6 certification. It was not a "97" paint

because the resin was not a styrene butadiene resin as required by that particular specification, but a vinyl toluene acrylate resin. It did not perform as a "97" paint because it did not pass the flexibility requirement (Tr. II-146; A Exh. 7).

[1] We find that the Government did not receive what it had bargained for. The Government's acceptance was based on its belief that the October 6 certification represented the actual chemical composition of the paint. When the Contracting Officer finds it in the best interests of the Government, he may decide to accept material that is not in total compliance with the specifications. That acceptance, however, is not final and conclusive if based on a misrepresentation of material fact.⁴ We find that the misrepresentation of the resin in the formula was a material one in that it induced the Government to evaluate and accept the paint because of its resemblance to a "97" specification. Had the resin in the formula been different, it would not have resembled a "97" specification. There is no evidence supporting appellant's contentions that Dr. Campbell was advised of the inability of the manufacturer to obtain a particular resin. It is clear from the evidence that the certification submitted on Oct. 6, 1976, was the final submission by the appellant of the

⁴ See *Catalytic Engineering & Manufacturing Corp.*, ASBCA 15257 (Feb. 28, 1972), 72-1 BCA par. 9342; and *Jo-Bar Manufacturing Corp.*, ASBCA 17774 (Sept. 26, 1973), 73-2 BCA par. 10,311.

September 28, 1979

paint formula to be furnished on the job, and that appellant never indicated any intent to deviate from that formula.

[2] The Board finds that the Government's decision to accept a non-specification material did not amount to a contract change. The Contracting Officer's acceptance of the submitted formula was only a *pro tanto* waiver of the specifications, meaning there was a waiver only as far as that particular submittal was concerned.⁵ Since we find that no contract change was ordered, the contractor had the option to submit the certified formula, or any other formula conforming to the original "555" specification. Appellant did neither! Not only was the paint at variance with the certified formula but it also failed the performance standards for the original specification, TT-C-555 B (Tr. II-130). We find totally unacceptable appellant's argument that "something" between a TT-C-555 B and a TT-P-97 was approved. Appellant should have known that the paint, regardless of the formula, would have to meet some type of performance standards, and if it had any questions in this regard, it had a duty to seek clarification. Appellant apparently was submitting "something" between a "97" and a "555" paint but that fact was concealed from the Government, and thus, acceptance was not based on that understanding. The manufacturer testified at Tr. I-42 about his

intentions after talking to Dr. Campbell:

I would assume that this letter preceded this conversation, because we ended up—Mr. Campbell and I on the phone didn't end up with any basic disagreements. There was one small item, because I remember distinctly now, after the phone call, saying something to either the salesman or both the salesman and the chemist, as—you know, don't fight that one, we'll throw them a bone. In other words, we've gotten what we feel was needed for this job, substantially, and so I would assume from that that this letter, you know, preceded the telephone conversation.

Lastly, the Board cannot ignore the existence of the contract's "Guaranty Clause" which provides that

[e]xcept where a longer period is established elsewhere in these specifications all work including labor, materials and equipment performed under this contract shall be guaranteed for a period of one year from the date of acceptance of the work by the Government. During the term of the guaranty the contractor, when notified by the Contracting Officer, shall promptly replace or put in satisfactory condition in every particular any deficiency in the guaranteed work, and shall make good all damage to the structures and grounds, and to any other material, equipment, and property which are disturbed in fulfilling the requirements of the guaranty or which have been damaged because of the deficient work.

In the event of failure by the contractor to comply with these provisions within 10 days following data of notification, the Government may proceed to have such defects repaired and the contractor and his surety shall be liable for costs incurred in connection therewith.

(AF Tab A, General Provisions, paragraph 36.)

⁵ Baker and Ford Co., GSBGA 2317 (Jan. 23, 1968), 68-1 BCA par. 6822.

The evidence shows that there has been a long history of paint problems at the White House and that paint jobs would normally last at least a year and a half before initial problems started to develop (Tr. II-87). The blistering and chipping in this instance started only 3 weeks after application, and there is no convincing evidence that factors other than improper paint formulation led to the performance failure of the paint in such a short period of time.

In conclusion, we find that the paint supplied did not meet the contract's performance specification; nor did it conform with the formula submitted and accepted by the Government as a "97" specification. The Government therefore was justified in requiring the appellant to repaint the White House and in holding it liable for the cost of the repainting.

Decision

Appellant's appeal is denied in its entirety.

BERYL S. GILMORE,
Administrative Judge.

I CONCUR:
WILLIAM F. MCGRAW,
Chief Administrative Judge.

APPEALS OF GREGORY LUMBER CO., INC.

IBCA-1237-12-78

1238-12-78

1239-12-78

1240-12-78

Decided: *September 28, 1979*

Contract Nos. OR090-TS7-3,
OR090-TS5-49,
OR090-TS6-18,
OR090-TS6-60,
Bureau of Land Management.

Motion to Dismiss Granted.

1. Contracts: Contract Disputes Act of 1978: Jurisdiction—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Motions

A contractor may not proceed under the provisions of the Contract Disputes Act of 1978 where the appeal is from a final decision of the contracting officer rendered and received by the appellant prior to the effective date of the Act.

APPEARANCES: Edward F. Canfield, Esq., Casey, Scott, & Canfield, Washington, D.C., for appellant; Mr. Lawrence E. Cox, Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE GILMORE*

INTERIOR BOARD OF CONTRACT APPEALS

The subject appeals under four different contracts for the sale of standing timber to appellant were filed on Dec. 12, 1978, with the

*Administrative Judge Russell C. Lynch did not participate in this decision since he has been and still is on emergency leave in California.

Board via the District Manager, Bureau of Land Management.

Appellant cited the Contract Disputes Act of 1978, P.L. 95-563 of Nov. 1, 1978 (41 U.S.C. §§ 601-613 (1976)), as the basis of jurisdiction. Similar appeals under the same contracts were filed with the Interior Board of Land Appeals. The contracts do not contain a "Disputes" clause; but rather, provide in Clause 37 for an appeal to the Board of Land Appeals pursuant to that Board's Rules of Practice (43 CFR Part 4, Subpart E). Under date of June 28, 1979, the Board issued an order to show cause why the appeals should not be dismissed for lack of jurisdiction. Final briefs were received on Aug. 28, 1979.

The four contracts under which the appeals are taken were entered into on Feb. 5, 1975, Sept. 4, 1975, Mar. 4, 1976, and Dec. 17, 1976. They are lump-sum sale contracts for the sale of timber from lands administered by the Bureau of Land Management. The awards resulted from auctions conducted by the Government after advertisement, with appellant agreeing to pay a specified price for timber to be cut and removed from designated tracts plus additional amounts to be determined by the Authorized Officer upon written authorization to cut additional timber not included in the original sale.

Appellant complains that the amount of timber cut from each of

the tracts was substantially less than described in the Government estimates in the bidding documents, that the quality of marketable timber was less than could be anticipated, and that the prices charged for additional authorized cutting were in excess of the agreed contract price. The District Manager, Bureau of Land Management, issued his final decisions on or about Nov. 21, 1978, denying the claims under the subject four contracts.

The appeals were filed with the Board after the date of enactment of the Contract Disputes Act of 1978, which was Nov. 1, 1978. The Board, *sua sponte*, raised the question of jurisdiction in light of the provisions of the Act relating to the effective date. That provision is set forth in sec. 16 of the Act and provides as follows:

Effective Date of Act

Sec. 16. This Act shall apply to contracts entered into one hundred twenty days after the date of enactment. Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter.

Discussion

Appellant submits that the Board should retain jurisdiction of the appeals for the following reasons:

1. Congress intended the Board to have jurisdiction in this instance,

2. Precedent,

3. Appeals have common issues with other appeals appellant has filed with the Board,

4. Appeals do not involve a transfer from an agency board to a court, and

5. Appeals before the Board continue to be "pending" before the contracting officer.

The Government argues that the appeals should be dismissed for want of jurisdiction in that the Contract Disputes Act does not apply to an appeal from a claim finally determined by the Contracting Officer prior to the effective date of the Act; that after a final decision is made by the Contracting Officer the claim ceases to be "pending" before the Contracting Officer.

The position of the Board on the jurisdictional question presented by these appeals is apparent from a reading of the Board's Interim Rules of Practice and is also consistent with the findings of other Boards on the same or similar issue. Sec. 4.100(a)(3) of the Board's rules provides as follows:

(3) *When an appeal is subject to the Contract Disputes Act of 1978.* An appeal shall be subject to the Contract Disputes Act of 1978 if it involves a contract entered into on or after March 1, 1979; or, at the election of the appellant, if the appeal involves a contract entered into before March 1, 1979, and the contracting officer's decision from which the appeal is taken is dated March 1, 1979, or thereafter.

The Armed Services Board of Contract Appeals held in an *Interlocutory Order by the Senior Deciding Group on Elections to Proceed Under the Contract Disputes Act of 1978*, dated June 6, 1979, that "pending" before the Contracting Officer refers to claims on which the Contracting Officer has not yet taken final action by mailing, electronically transmitting, or otherwise issuing his final decision; and that "then" means Mar. 1, 1979.¹

In *Bick-Com Corp.*, VACAB-1433 (June 19, 1979), 79-2 BCA par. 13,904, the Board found the election to proceed under the Contract Disputes Act not available where the decision by the Contracting Officer had been issued and received by the contractor over 3 months before the effective date of the Act.

The decision in this instance hinges on the Board's interpretation of the phrase "pending then before the contracting officer."

We find that a claim is "pending" before the Contracting Officer during the period of time between receipt of the claim and the issuance of the final decision on the claim by the Contracting Officer. We find that "then" means on the effective date of the Act and does not include the interim period between the date of

¹ *Monaco Enterprises, Inc.*, and *Towne Realty, Inc.*, ASBCA 23611 and 23676 (June 6, 1979), 79-2 BCA par. 13,944.

enactment and the effective date. This being found, it is clear that a contractor can only elect to proceed under the Contract Disputes Act (where the contract was executed prior to the effective date) if the claim was pending before the Contracting Officer on Mar. 1, 1979. Since the Contracting Officer's final decision was rendered prior to Mar. 1, 1979, and the decision had been appealed to the Board prior to Mar. 1, 1979, the contractor cannot elect to proceed under the Contract Disputes Act.

There being no "Disputes" clause in the contract or other available remedy which would give the Board jurisdiction over these appeals, the subject appeals are hereby dismissed.

BERYL S. GILMORE,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

CONSOLIDATION COAL CO.

1 IBSMA 273

Decided September 28, 1979

Appeal by Consolidation Coal Co. from
a decision by Administrative Law

Judge Truswell which decision affirmed a notice of violation issued by the Office of Surface Mining Reclamation and Enforcement to Consolidation for an alleged violation of the effluent discharge limitations of 30 CFR 715.17 (Docket No. IN 9-9-R).

Vacated and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Inspections

In the absence of extraordinary circumstances, the Board is unwilling to consider an entry made without prior presentation of credentials by an inspector to be in compliance with the requirements of 30 CFR 721.12(a).

APPEARANCES: Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, and Shelley D. Hayes, Esq., Office of the Solicitor, for appellee Office of Surface Mining Reclamation and Enforcement; Daniel E. Rogers, Esq., Senior Counsel, for appellant Consolidation Coal Co.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On Nov. 8, 1978, an Office of Surface Mining Reclamation and Enforcement (OSM) inspector visited the Consolidation Coal Company's (Consol) Burning Star No. 4 Mine in Perry County, Illinois. He went to the mine office, introduced him-

self, and then proceeded to make an inspection. During the course of the inspection he noticed water flowing in a ditch. It was not possible to take a sample to check for possible violations of the effluent discharge regulations at that time. On Nov. 20, 1978, the inspector returned; he did not stop at the mine office but proceeded directly to take a water sample from the ditch. On the basis of this OSM action on Nov. 20, it issued Notice of Violation No. 78-III-5-12 on Nov. 27, 1978, which alleged that Consol had violated the provisions of 30 CFR 715.17 on Nov. 20, 1978. The nature of the violation was that "discharge from disturbed area fails to meet effluent limitations for total suspended solids." Consol did not dispute the substantive charge.

On Dec. 21, 1978, Consol applied for review of the notice. A hearing was held before Administrative Law Judge (ALJ) William J. Truswell in Evansville, Indiana, on Apr. 11, 1979.

Consol contended that the inspection by OSM on Nov. 20, 1978, was illegal because OSM entered the property of Consol in violation of the requirement of 30 CFR 721.12 (a) that necessitates a presentation of credentials by an OSM inspector upon entering a minesite.

The ALJ sustained the notice of violation and Consol brought this appeal. The sole question before the Board is whether OSM complied

with 30 CFR 721.12(a) in making its inspection of Nov. 20, 1978.

Discussion

What happened in this case is not contested. Twelve days after the OSM inspector's initial visit, he returned to collect a grab sample of water flowing in a ditch he had noticed on the initial visit. He went directly to the ditch and collected the sample. He did not present his credentials at the office nor to anyone beforehand but after taking the sample, he did encounter some Consol employees, did identify himself, and then drove to the mine office.

[1] Sec. 721.12(a) of the regulations says authorized representatives of the Secretary shall, "without advance notice," have a right of entry "to, upon, or through any surface coal mining and reclamation operations" upon presentation of appropriate credentials.¹ Advance

¹ 30 CFR 721.12(a) is the analog of 30 U.S.C. § 1267(b)(3) (Supp. I 1977). Their pertinent parts read as follows:

"[T]he authorized representatives of the regulatory authority, without advance notice and upon presentation of appropriate credentials (A) shall have the right of entry to, upon, or through any surface coal mining and reclamation operations or any premises in which any records required to be maintained under paragraph (1) of this subsection are located; * * *"

30 U.S.C. § 1267(b)(3) (Supp. I 1977).

"§ 721.12 Right of entry.

"(a) Authorized representatives of the Secretary, without advance notice and upon presentation of appropriate credentials and without a search warrant, shall have the right of entry to, upon, or through any surface coal mining and reclamation operations or any premises in which any records required to be maintained are located."

notice of a visit is not required, nor is a search warrant, but presentation of appropriate credentials is. Absent a showing of extraordinary circumstances such as that presentation of credentials would be tantamount to advance notice, we are unwilling to consider an entry made without presentation of credentials in compliance with the requirements of the regulations.² This is not to say that an OSM inspector must wait patiently at the perimeter of the permit area until an operator asks him for his credentials. He may proceed to the minesite office or to the first available person on the minesite. Nor must an OSM inspector present credentials if he has left the permit area shortly before re-entering.³ However, for the safe and

orderly operation of their mines, operators are entitled to know who is on their property and when. Presentation of credentials at the earliest practical opportunity and whenever requested to do so after each entry facilitates such safety and orderliness and does not impose undue burdens on OSM's inspection program. We assume extraordinary circumstances will be rare and that OSM will be able adequately to demonstrate such existed if there are challenges to enforcement actions based on entry without presentation of credentials.⁴

Because there was testimony that the inspector believed that were he to present his credentials before commencing the inspection, the of-

² Indeed, there is no question that the Department contemplated legal entry in some circumstances where no prior presentation of credentials would be advisable or capable of being performed. Comment 11 to Part 721 reads, in part, as follows:

"It is not intended that inspections be restricted to 'normal business hours' if the exigencies or violations justify inspection at other times. An example would be attempts to detect illegal discharges or other night-time activities which are prohibited by the Act or regulations."

42-ER 62664 (Dec. 13, 1977).

³ Another device that OSM might consider is the wearing of distinctive garb. The police learned long ago that distinctively marked vehicles and badges of office displayed on the person of the officer not only did not trammel, but actually aided, the policeman in the performance of his duties. An emulation of that policy by OSM, in this small regard, might remove all question of illegality of entry—at least in routine inspections.

Although repeated voluntary presentation and constant display of credentials may not

be required by the regulations, we offer no opinion concerning whether inspectors and those who accompany them—or their estates—would jeopardize their possibilities of recovery for injuries sustained during an inspection where credentials had not been presented before the injuries occurred.

⁴ The ALJ also found that this was a continuing inspection, thus obviating any subsequent showing of credentials beyond the initial one. Although most entries are for the purpose of inspections, the applicable law requires a display of credentials upon entry, not inspection (n. 1, *supra*). Moreover, the purported continuous nature of the inspection was not revealed by any words or conduct of OSM, but reposed solely in the mind of an inspector who saw something he decided to check at a later time.

We are not prepared at this time to say whether there never can be a continuing inspection whose circumstances would require a presentation of credentials only on the initial entry. But even if one can exist, the 12-day interval between visits and the other circumstances of this case do not warrant the finding of a continuous inspection here.

fensive conduct could be terminated and a sample therefore would be unobtainable (Tr. 19), we are remanding so that the ALJ may determine whether or not sufficient conditions in fact existed to warrant the entry without a prior presentation of credentials.

The ALJ's decision is vacated and the case is remanded to the Hearings

Division for further proceedings not inconsistent with this opinion.

MELVIN J. MIRKIN,

Administrative Judge.

WILL A. IRWIN,

Chief Administrative Judge.

IRALINE G. BARNES,

Administrative Judge.

APPEAL OF M & P EQUIPMENT CO.

Background

IBCA-1088-11-75

Decided *September 28, 1979*

Contract No. 14-06-500-2152 (Specifications No. 500C-329), Bureau of Reclamation.

Denied.

Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Construction and Operation: Duty to Inquire—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Equitable Adjustments

Where a clearing contractor claims entitlement to an equitable adjustment base on the standard Differing Site Conditions Clause of the contract, and the evidence shows that the principal causes of any increased costs which may have been incurred were heavy rains and failure of the contractor to make a reasonable prebid investigation of the site or examination of specifications, and no evidence of fault on the part of the Government is presented, the Board holds that the contractor has not sustained its burden of proof for entitlement to an equitable adjustment, and the appeal will be denied.

APPEARANCES: Mr. Herby Branscum, Jr., Attorney at Law, Perryville, Arkansas, for appellant; Mr. Z. P. Sheldon, Department Counsel, Amarillo, Texas, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from the Contracting Officer's denial of a claim by the contractor/appellant, M & P Equipment Co. (M & P; sometimes, appellant), for additional compensation in the amount of \$46,630. The claim arises out of a contract with the Bureau of Reclamation awarded to M & P for clearing Mountain Park Reservoir, Mountain Park Project, Oklahoma. The contract was completed and accepted Jan. 30, 1975, well within the completion time prescribed by the contract.¹ The full contract price of \$117,000 was paid to M & P. However, M & P excepted the claim of \$46,630 from the release it executed in connection with final payment.

According to its complaint, M & P based its claim on Clause No. 4 of the General Provisions of the above-numbered contract;² alleging that

¹ The contractor was to begin work within 15 days after date of receipt of the notice to proceed. The notice to proceed was dated Jan. 31, 1974. The completion time allowed for all clearing of Phase 1, below elevation 1,390, was 180 days; and for Phase 2, above elevation 1,390, was 360 days (AF-4 & 5).

² Clause 4 provides:

"4. Differing Site Conditions

"(a) The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a

the damages claimed resulted from occurrences caused by persons other than claimant "which this claimant had no control over and which could not have been prevented by this claimant;" and alleging further that, as a result of the negligence of supervision and control over the operations of the project and inadequately formulated plans for the project, the claimant suffered the following damages by having to provide extra equipment and labor expense:

1 108B Linkbelt Crane -----	2 months--	\$ 8,000.00
1 D8 Caterpillar Dozer -----	1 month--	5,000.00
2 D-7 Caterpillar Dozers -----	1 month--	8,000.00
2 Log Skidders-----	1 month--	4,600.00
6 Extra Chainsaws @ One- half Price 130.00-----		780.00
Moving 108B Linkbelt Crane to and from Job-----		2,220.00
Labor—Four (4) Weeks Pay- roll -----		12,668.95
Moving 2 Log Skidders to and from Job-----		2,438.00
Taxes & Insurance on Pay- roll (23.07%)-----		2,922.73
Total -----		\$46,630.00

Appellant alleged that the specific incidents which caused the damage were as follows:

(a) On or about March 2, 1974, the dirt piled adjacent to the bank (both

F. N. 2—Continued

result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

"(b) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (a) above; provided, however, the time prescribed therefor may be extended by the Government.

"(c) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract."

sides) of West Otter Creek for approximately 1000 feet upstream from the dam washed into the creek causing water to submerge portions of sections 10, 9, 3 and 4. Land in the area that was not flooded was saturated with subsurface water making it impossible to operate heavy equipment, requiring claimant to change its operation to the use of chainsaws, skidders, crane and hand labor. This condition was caused by those constructing the dam and claimant had no supervision, power, authority or control over that operation creating the adverse condition.

(b) On or about April 19, 1974 on Glen Creek at Highway 183 a contractor other than claimant doing work on the project constructed an earthen dam to supply water for his job on the project, the water backed up by the dam caused usually [sic] wet conditions, then as claimant below the dam with its clearing the dam cut by another contractor causing flood condition in the area where claimant was working.

(c) On or about April 28, 1974 there were rains in the area that were unusually heavy, and the diversion pipe being used by the contractor constructing the dam was inadequate to divert the water, the pipe was corrugated metal about 7 feet in diameter, and it collapsed causing the area to flood and allowing the ground to become fully saturated with water. This collapse of the diversion pipe and subsequent flooding caused debris [sic], logs and trash to be deposited upon areas that had been cleared requiring additional work for claimant to re-clear. The ground saturation from the flooding caused by the collapsed pipe caused claimant to resort to hand labor which was much slower than had been planned by machinery.

That all of the foregoing conditions adversely affecting claimants [sic] job were caused by operations other than plaintiff's operation. The Bureau of Reclamation was promptly and fully notified of each condition.

By its answer, the Government admitted, in pertinent part: That

work on the project by M & P started about Feb. 18, 1974; that damages claimed by appellant may have resulted from occurrences caused by persons over whom appellant had no control; and that some of the conditions may have existed as alleged in subparagraph (a) above. However, it denied generally the remaining allegations of the complaint and denied specifically that the appellant has a valid claim against the Government for the damages alleged. The Government asserted that it had made full payment to appellant in accordance with the terms of the contract and requested the Board to find that appellant is not entitled to reimbursement by the Government for the alleged damages and to deny the appeal.

A hearing was held at the request of appellant at Altus, Jackson County, Oklahoma, on Oct. 27, 1978. The transcript thereof was received by the Board on Dec. 20, 1978, and at his request, counsel for appellant was granted an extension until June 27, 1979, within which time to submit his brief. (Order of the Board, dated May 30, 1979.) His brief was filed on June 27, 1979. On July 23, 1979, the Government filed a renewed "Motion to Dismiss," together with its "Posthearing Brief." By letter of Aug. 9, 1979, counsel for appellant indicated that he would not file a reply brief, stating, "I have decided to stand on the brief that I have already filed."

The Motion to Dismiss

Early in this proceeding, the Board denied what it treated as the Government's motion to dismiss, but without prejudice to its right to renew such motion at the time its posthearing brief was filed. Accordingly, the motion to dismiss was renewed. The ground stated therefor was that "[a]ppellant's claim for additional compensation for costs incurred, asserted * * * to be due to the Government's negligence, is a claim for breach of contract which is beyond the jurisdiction of the Board of Contract Appeals to decide."

Since this appeal does not come under the Contract Disputes Act of 1978,³ we do not have jurisdiction to decide this case on a breach of contract theory. However, we are not convinced that appellant's claim is properly characterized as involving that theory. Giving the appellant the benefit of the doubt, it may have sufficiently alleged a claim based on breach of the Government's duty to cooperate and not to hinder contractor's performance,⁴ or on the theory of defective specifications. The motion is therefore denied.

³ P.L. 95-563, 92 Stat. 2383, (to be codified in 41 U.S.C. §§ 601-613). The effective date of this Act is Mar. 1, 1979. Sec. 8(d) (41 U.S.C. § 607(d)) expanded the jurisdiction of agency boards of contract appeals by authorizing them "to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims."

⁴ See *Louis M. McMaster, Inc.*, AGBCA No. 76-156 (Feb. 23, 1979), 79-1 BCA par. 13,701; *Laburnum Construction Corp.*, 163 Ct. Cl. 339 (1963); and *United States v. Spearin*, 248 U.S. 132 (1918).

Issue Presented on Appeal

According to their briefs, the parties agree that the principal issue before the Board is whether the Government is liable for damages caused to appellant as a result of negligent supervision and control of the worksite.

Contentions of the Parties

Appellant's brief summarizes the facts to be as follows:

The Department of the Interior contracted with the claimant to clear land for the Mountain Park Reservoir Project. Contractors piled dirt along a creek which subsequently washed into the creek and flooded 4 sections of land claimant was clearing. Another contractor caused flood conditions in claimant's work area when a dam used to supply water was cut. Heavy rains caused a diversion pipe to collapse and flood an area claimant had already cleared thus creating additional work for claimant because of the necessity of re-clearing the land. The claimant was forced to abandon the use of heavy equipment in the clearing of the land and was forced to use hand labor and chain-saws [sic].

Appellant's brief then lists the points of law upon which it relies and cites numerous cases to support the points of law. The listing is as follows:

The government is liable for the damages caused to the claimant as a result of the negligent supervision and control of the worksite. A contractor is entitled to additional compensation or reimbursement for increased costs of performance and expenses caused by act or omissions of the government including negligence on the government's part. A government contract contains an implied warranty that the specifications are adequate if complied with. The government also has a duty not to impede the contractor's per-

formance. This duty applies to other contractors over whom the government has control. The government is also liable for extra and unanticipated hazards even when the contractor assumes the liability for loss.

Although in the "Discussion and Argument" portion, appellant's brief contains correlations of the points of law with the *allegations* of the complaint, there is no attempt to correlate them with any *evidence* of record. There are no transcript citations to the testimony and no references to any of the exhibits or items in the appeal file. What appellant considers to be its *proof* in support of necessary findings of fact to which the cited case law may be applied is not indicated. The final paragraph, entitled "Conclusion," is as follows:

The respondent [Government] stood by in this case and allowed other contractors on the job to create conditions which required this claimant to expend additional monies to perform his contract. The only party on the entire project having the authority to direct preventive measures was the respondent. Respondent's failure to perform its legal duty in this regard entitles appellant to recover its damages of \$48,630.00.

In its brief, the Government analyzes in detail the case law cited by appellant and argues generally that the cases cited either are distinguishable on their facts from the facts of the case at hand, or are not in point.

With respect to the facts, the Government's contentions may be summarized as follows: That the unanticipated conditions causing appellant increased costs resulted from appellant's cursory, prebid investi-

gation of the worksite, its failure to examine the plans and specifications in the contracts of other contractors on the project, and from unusually heavy rains; that there is no evidence showing that the difficulties encountered by appellant were attributable to acts or omissions of employees of the Government; that the dam contractor's plans and specifications were available to appellant and showed that the area where the dirt was piled was designated as a waste area for the dam contractor; that there is no evidence showing that the earthen dam, allegedly breached by another contractor, caused appellant any delay or damage; and that the collapsed diversion pipe, alleged by appellant to have caused flooding upstream from the coffer dam, did not inhibit the flow of water, but, in fact, was flowing at full capacity after the break.

The Government's conclusions contained in its brief include the following:

Appellant failed to present any evidence in support of its allegation, that the Government was negligent in its supervision and control of the worksite, nor did it present evidence to show project plans were inadequately formulated. * * *

The Government is not liable for damages resulting from Appellant being unable to complete its obligation under the contract in substantially less time than allowed under the contract. * * *

The conditions alleged by Appellant to have been caused by the Government were not "differing site conditions" under article 4 of the contract. * * *

The real impediment to contractor's attempt to finish ahead of schedule was the abnormal amount of rain, which is not a "changed condition" and does not

entitle Appellant to additional compensation.

The Evidence

Exhibit 5 of the Appeal File (AF-5) contains the construction contract and the specifications No. 500C-329 pertaining to this proceeding. Clause 13 of the General Provisions of the contract provides:

13. Conditions Affecting the Work

The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Government. The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.

The pertinent sections of the specifications provide as follows:

14.1. INVESTIGATION OF SITE CONDITIONS

Bidders are urged to visit the site of the work and by their own investigations satisfy themselves as to the existing conditions affecting the work to be done under these specifications. If the bidder chooses not to visit the site or conduct investigations he will nevertheless be charged with knowledge of conditions which reasonable inspection and investigations would have disclosed.

Bidders are also urged to carefully examine all of the materials and information regarding site conditions made available by the Government and to obtain their own samples and perform tests

on the soil and rock materials to determine unit weights, to evaluate shrinkage and swell factors, and to evaluate other properties which the bidder believes to be significant in arriving at a proper bid.

Bidders and the contractor shall assume all responsibility for deductions and conclusions as to the difficulties in performing the work.

1.4.5. INTERFERENCE WITH THE WORK

Under separate contracts, the relocation of U.S. Highway 183, the relocation of the St. Louis and San Francisco Railway, construction of the Mountain Park Dam and dikes, the roosevelt [*sic*] water wells, access road, and pipelines, and other features of the Mountain Park Project will be in progress at the same time as work required by these specifications. The clearing contractor shall schedule and conduct his activities in coordination with other contractors in the area so that interference with other work is minimal.

1.4.11. CREEK DISCHARGE RECORDS AND DIVERSION WORKS INFORMATION

Hydrographs of the West Otter Creek and the creek diversion plan of the contractor for construction of Mountain Park Dam may be examined on drawings filed in the project office. These drawings and data are available for information of bidders and the contractor. The Government does not guarantee the reliability or accuracy of the hydrograph or diversion works information and assumes no responsibility for any deductions, conclusions, or interpretations which may be made from them.

2.1.3. PRIORITIES AND QUANTITIES

a. Priorities.—Clearing below elevation 1390, identified as Phase I clearing in paragraph 1.2.3, shall be completed in the initial months of the contract to assure clearing of the area prior to flooding occa-

sioned by construction of diversion works by the dam contractor. Phase II clearing constitutes all clearing above 1390 contour.

The appellant's witnesses were Mr. Levi Patton and Mr. Jimmy A. Patton. Since retiring, Mr. Levi Patton, who had had around 30 years in the construction business, has been doing some work for his son, Jimmy, President of M & P Equipment Co. (Tr. 17). Levi Patton served as project engineer on the Mountain Park Reservoir clearing job (Tr. 18).

His testimony, with respect to the first incident set forth in the complaint, was substantially as follows:

That Otter Creek and Glen Creek join together about 500 or 600 feet upstream from the dam, and that a canyon exists at the location which is where the work started; that while working with chain saws and a dozer, the clearing crew had trouble with water caused by the dam contractor piling dirt along the creek; that the dirt was sliding into the creek, backing up the water instead of allowing it to run through the coffer dam which caused the unanticipated use of a crane and more chain saws and hand labor (Tr. 26-34).

With respect to the second incident, Mr. Levi Patton's testimony is summarized as follows:

That on or about April 19, 1974, difficulty was experienced because of a little dam that had been built by another contractor across Glen Creek near the bridge on Highway 183, presumably to provide water for trucks; that clearing work had been going on in the area below this dam for about 10 days, when somebody breached the dam causing water to flood the working area; that this prevented the normal functioning of the bulldozers so that a crane was required which was more costly to operate (Tr. 34-43).

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His general testimony regarding the third incident was:

"That about April 28, 29, 1974, it started raining and rained so hard that he got his crew out of bed at the motel where they were staying at about 1:00 a.m.; that to prevent the equipment from being ruined, they went to the working area and moved the equipment to higher ground; that "the coffer dam just folded up," and "it just flooded the whole country"; that the timber which had been piled in decks was knocked off the banks and carried back over the territory already cleared; that then "we had to go in there and clean all that up"; and that then "all we did was work in mud and water" (Tr. 43, 44).

His verbatim testimony (Tr. 44, 45) was as follows:

Q (By Mr. Branscum) Wait just a minute now. What caused the flooding? You say that there was a diversion pipe in the Coffey Dam; is that correct?

A It was on account of this heavy rain up above coming down and all, the creek.

Q Did anything happen at the Coffey Dam that caused the flooding to increase?

A Yes, it couldn't take the water, you know. It folded up there.

Q What folded up?

A The pipe that drained all the water.

Q Okay.

THE COURT: When you say "folded up," do you mean it was blocked? It was bent?

THE WITNESS: Yes, sir.

THE COURT: Or what?

THE WITNESS: Yes, sir, just knocked it out to the side.

THE COURT: Was this made of some kind of metal, this pipe?

THE WITNESS: Yes, sir, sheet metal.

THE COURT: And you say it folded, and that blocked the water from going through?

THE WITNESS: Yes, sir.

THE COURT: I see.

Later on, at page 47, the transcript contains the following testimony:

THE COURT: What was the diameter, if you know, of that pipe roughly?

THE WITNESS: Your Honor, I never did, you know, measure the pipe. Of course that was out of my contract, you know.

THE COURT: Did you see it?

THE WITNESS: Yes, sir.

THE COURT: What would you estimate the diameter?

THE WITNESS: I was estimating it to be around 7 foot diameter.

* * * * *

Q (By Mr. Branscum) Now, you say that the rain and flood, the heavy rain buckled the pipe, and it just collapsed; is that correct?

A That's correct.

Under cross-examination, Mr. Levi Patton testified substantially as follows:

That under the terms of the contract, he had complete discretion as to type of equipment and number of men he used; that he and his son, Jimmy, looked over the site prior to the contract award and that while looking over the creek, he said, "Well Jimmy, you know, dry like it is, why we can work most of it with dozers and cutter dozers and rakes, and that is what we figured on"; that he was advised that he should coordinate his work with the other contractors in the area; that he did not know who breached the dam on Glen Creek; that according to the contract the Government could not have forced him to complete the job ahead of the designated time; and that in clarification of his testimony on direct examination, he had intended to use a crane from the beginning, but that the flooding required getting a larger crane, the link belt crane (Tr. 53-58).

Mr. Jimmy Patton's testimony on direct examination (Tr. 61-90) may be summarized as follows:

That in the fall of 1973, he looked over the job site, just the clearing areas, with a Mr. Albright, an explosives man for

another contractor, did very little walking, but drove the farm roads; that he observed that the land "was as dry as a bone—to me, it looked like it was a drought out here"; that Glen Creek and Otter Creek had very little water, just a trickle in them, just a pot hole here and there; that that was the only site visit he made before the bid; that the job was bid in two phases; that phase 1 was below 1,390 feet elevation, bid at \$37,000, and phase 2 was above 1,390 feet elevation, bid at \$80,000; that after being notified of the award, he made a second visit to the job site and noticed a diversion system and coffer dam being built with a 7-foot corrugated steel pipe that ran through the dam; that he commented to his dad that it was awful small and he was afraid it was going to give them a lot of problems; that he called this to the attention of the Bureau by his letter of December 31, 1973 (Exh. D, AF-1); that he visited the job two or three times after it commenced; that he observed the dirt dumping and sliding incident right after the wet condition occurred in early March, and noticed the blockage and pooling which caused saturation from a subsurface standpoint; that he then arranged for the large, link belt, 108 crane to replace the small crane he was planning to use; that he recalled the breached dam incident on Glen Creek and that after that, they used one crane and two log skidders in place of the bulldozers; that he did not visit the job immediately, but sometime after the large flood; that it had rained about 7 inches in 1 or 2 days; that the diversion system and coffer dam "wasn't big enough to carry the flow of water," which is what he was alluding to in his letter of December 31; that he had figured probably they would need a 12- or 15-foot diameter pipe; and that if there had been a 25-foot diversion pipe in this coffer dam "I don't think it would have took it."

The cross-examination of Mr. Jimmy Patton (Tr. 112-119) produced the following testimony:

That he did read the contract and the specifications prior to submitting his bid and remembers the provision concerning the investigation of the site advising bidders to visit the site and determine what the conditions were; that during his investigation of the site, "I didn't check the dam out at the time, but I looked the clearing area over—that was the only part I was concerned about"; that *he did not examine the dam constructor's plans for diversion prior to submitting his bid and remembers that in the specifications he was advised that they were available in the project office*; that he did not see the diversion pipe after it broke, but assumed it collapsed or buckled and twisted; and that it did not function—the water was not going out of it—he knew this—he did not personally see it himself, but his father did.

The Government's two witnesses were Phillip B. Lankford and Dewey W. Geary, Jr. Mr. Lankford had been employed by the Bureau of Reclamation (Bureau) for 35 years at the time of the hearing. At that time, he was Chief of the Field Engineering Division, but Chief Inspector for the Bureau during the M & P clearing job. Mr. Geary had been employed 17 years by the Bureau and was Project Construction Engineer for the Mountain Park Project during the performance of the clearing contract. He is a registered Civil Engineer with a B.S. degree in Civil Engineering from the University of Iowa.

The direct testimony of Mr. Lankford (Tr. 122-128) may be summarized as follows:

That in the performance of his duties as inspector, he visited the project about every 2 days; that he visited the dam site after the diversion pipe broke on April 30, 1974, at which time he took a photograph (Government Exhibit D) which is a pic-

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ture of the downstream side of the upstream diversion or coffer dam; that *the picture was taken after the pipe broke and shows that the water was running through the pipe at full flow*; that prior to flood, the pipe had been supported by wooden towers between the upstream and downstream coffer dams; and that the towers collapsed and the pipe broke, but the water continued to flow through it and no additional ponding upstream from the upper diversion dam, where M & P was working, was created by the collapse.

His cross-examination (Tr. 128-157) brought forth the following testimony:

That the collapse took place at about 4:00 a.m. during the morning of April 30, 1974; that the diversion pipe was 72 inches in diameter; that the distance between the two coffer dams was about 200 feet, less than a block; that the pipe permitted the water to flow just as well after the collapse as before; that the dam contractor designed the diversion pipe and the Government had recommended that its size be a minimum of 6 feet; that the area immediately above the upper coffer dam had once been inundated by the old Snyder Dam, built in the 1930's which had a top elevation of 1,370.1 feet, and was breached in 1972 so that the area where M & P was working "never did dry up" and contained only small growth, just weeds and real fine brush, because it had been standing in water since the 1930's; that he inspected that area in response to M & P's complaint regarding the dirt piling incident along Otter Creek, and that the backup of the water was in the confines of the creek banks extending up to where the creeks ran together; that although some of the backup was probably caused by the dirt piles sliding off, he could not tell that it was hampering the operations of M & P; that, except for correspondence between M & P and the Bureau, he was not aware of the cutting of the small dam near Highway 183, and in the course of his regular inspections

did not observe any water in the working area.

The significant portions of Mr. Geary's testimony adduced by direct examination (Tr. 157-180) were:

That the reason for dividing the M & P clearing job into two phases was to minimize conflicts between the clearing of the reservoir and the construction of Mountain Park Dam; that the work under the clearing contract was completed within the specified times for both phases; that it was anticipated by the Bureau that other contractors would be working in the area during the clearing contract and the prospective bidders were made aware of that fact by the specifications; that the dirt piling along Otter Creek was part of the diversion system plan under the contract with the Mountain Park Dam contractor and the upstream portion along the banks was designated as a waste area for the dam contractor; that, with respect to the Glen Creek incident, he had given permission to the highway relocation contractor, Cornell Construction, to build a small earthen dike in Glen Creek in 1972 or 1973 for construction purposes; that it was 8 feet high and about 30 feet across within the creek channel; that about a month later, some heavy rains washed out the dam down to a couple of feet, down to the channel, and the contractor made no attempt to rebuild it; that this dam had washed out more than a year before the bids were made for the clearing project; that he was not aware of the breach of the small dam that remained of which M & P complained, or who may have breached it; that the specifications for the construction of Mountain Park Dam required the dam contractor to submit a plan for the diversion of West Otter Creek; that the plan as finally approved was made available to the bidders on the clearing project; that the collapse of the diversion pipe did not interfere with appellant's clearing operation; that the dam contractor suffered the real loss as

a result of the breaking; that the pipe was constructed in 20-foot sections and did not actually break, but rather came apart at the joints held together by 1-foot bands; that there was no blockage in the pipe that went through the coffer dam; that the breaking of the pipe had nothing to do with the upstream reservoir; that the system continued to function as it was designed; and that the Government did not intentionally, or otherwise, interfere with appellant's clearing operation.

The testimony, in general, developed by the cross-examination of Mr. Geary (Tr. 180-202) was:

That the big flood resulted from a heavy, heavy rain—about 7 inches in 2 days; that although all that much rain is abnormal, it is not really unusual for that area to be dry for a year then get tremendous rain at one period; that the diversion pipe in the coffer dam was not too small—it was only supposed to carry the normal flow and not the flood water; that had the pipe been 12 or 15 feet in diameter, there would have been less flooding above the coffer dam; that had M & P looked at the plans and specifications for the approved diversion plan, they certainly would have known that the area stood the chance of being inundated during heavy rains; that he did not see the sliding of the dirt which had been piled up along the creek as a problem since the area was not flooded and the water was down in the channel itself; that the dam contractor was required to keep the elevation above the coffer dam at the 1,365-foot elevation only during normal flows; that during a flood situation, he had no control over it, and the rainfall and time factors determined the receding; and that the dam contractor had the choice of taking the 6-foot pipe and a higher coffer dam or a larger pipe and lower coffer dam.

The substance of his redirect examination testimony (Tr. 202-204) was:

That the problems the clearing contractor had with the high water were problems which were to be anticipated from the specifications; that the Bureau anticipated the possibility of flooding by the language in section 2.1.3 of the specifications; that the flooding was not caused by the breaking of the pipe, but was a condition caused by the heavy rains.

Analysis and Findings

Both witnesses for the appellant admitted their failure to examine the diversion system plans showing the 6-foot diversion pipe as well as the designated waste area for piling dirt along the creek bank. The photograph taken of the 6-foot pipe on Apr. 30, 1974, as well as the testimony of the two Government witnesses conclusively indicate that Mr. Levi Patton was apparently mistaken in his conclusion that the pipe was bent and buckled and blocked the water from flowing through the pipe. There was no persuasive evidence presented that suggested negligent supervision or control over the project by the Government project engineers or any other Government personnel. The evidence is undisputed that the major cause of the big flood was the heavy rains which occurred on or about Apr. 29 and 30, 1974. It was also undisputed that the contractor here was not delayed in the completion of the contract since the work was completed and accepted well within the specified completion dates.

Consequently, based upon the clear preponderance of the evidence, as indicated above and shown by

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our review of the entire record, we make the following findings of fact:

1. That a reasonable prebid site investigation and examination of the specifications for the clearing contract and of the diversion system plans and specifications for the dam construction contract on the part of the appellant would have disclosed the hazards and danger of the flooding which was later encountered;

2. That even though invited, along with other bidders, to do so, appellant's personnel failed to examine the diversion system plans approved for the dam construction and gave only cursory attention to specifications for the clearing contract;

3. That the work of appellant in the performance of its clearing contract was not interfered with or impeded by any negligent act or omission on the part of any Bureau employee or other personnel of the Government;

4. That the diversion pipe running through the upper coffer dam was not blocked upon the collapse of the wooden tower supporting structure, but continued to function as it was designed to function by allowing the water to flow through it to full capacity after the collapse;

5. That any increased costs, which may have been sustained by the appellant, resulted from the heavy rains and from appellant's own failure to anticipate that the area in which it would be working might be susceptible to flooding; and

6. That appellant's claimed damages were neither the result of negligent supervision and control over the operations of the project nor of inadequately formulated plans or defective specifications as alleged or inferred by the complaint.

In *Charles T. Parker Construction Co.*, IBCA-355 (Jan. 29, 1964), 71 I.D. 6, at p. 10, 1964 BCA par. 4017, at pages 19,792, and 19,793, this Board stated:

It is well settled by the courts and by opinions of this Board that where work is damaged before completion and acceptance by an Act of God or by other forces of nature, without the fault of either party, and in the absence of a contract provision shifting the risk of such a loss to the Government, the contractor is obligated to repair the damage at its own expenses. [6]

In *Concrete Construction Corp.*, IBCA-432-3-64 (Nov. 10, 1964), 71 I.D. 420, 65-1 BCA par. 4,520, this Board denied an appeal of a road construction contractor who had claimed relief under the changed conditions clause of the standard construction contract. In the course of that opinion, we said:

Neither the expression "subsurface or latent physical conditions at the site" * * * are apt methods of describing weather phenomena, such as heavy rain, high winds, or low atmospheric temperature. This has been recognized in the decided cases, which have consistently held that neither of the two categories of changed conditions comprehends storms,

* See also *Montgomery-Macri Co. & Western Line Construction Co., Inc.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242 at 279 and 339, 1963 BCA par. 3,819 at pages 19,023 and 19,056, and the cases cited in footnote 40 thereof.

floods, or other forms of abnormal weather.

* * * * *

There is no showing that appellant before bidding sought information as to the time of year when the test holes were driven, or that such information, if sought, would have been refused. In these circumstances the risk that the test holes might have been driven during a normally drier period of the year than the period consumed in contract performance was a risk that appellant assumed under Clause 13 of the contract, as quoted above.

We said, in *Humphrey Contracting Corp.*, IBCA-555-4-66 and IBCA-579-7-66 (Jan. 24, 1978), 75 I.D. 22, 68-1 BCA par. 6820, which also involved performance of a clearing contract: "It is well settled that a changed condition of the second category does not exist if a reasonable pre-bid investigation would have disclosed the existence of the condition which is the subject of the claim."

Decision

In this case, appellant has claimed increased costs resulting from a "differing site" or "changed" condition pursuant to the provisions of paragraph 4(a), General Provisions of the contract. That paragraph places the compensable differing conditions into two categories. Category (1) pertains to sub-surface or latent physical conditions at the site differing materially from those indicated in the contract. Category (2) deals with unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inher-

ing in work of the character provided for in the contract.

Based upon the foregoing analysis of the evidence, findings of fact, and cited case authority, we conclude that appellant has failed to show a changed condition under either category. We hold, therefore, that appellant has not sustained its burden of proof establishing entitlement to an equitable adjustment.

Accordingly, the appeal is denied.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

R. GAIL TIBBETTS ET AL

43 IBLA 210

Decided October 5, 1979

Appeal from three decisions of the Utah State Office, Bureau of Land Management, declaring various lode-mining claims null and void ab initio. AD 49-78, 50-78, and 51-78.

Affirmed in part, set aside and hearing ordered in part.

1. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Location—Mining Claims: Relocation—Mining Claims: Withdrawn Land

For the purpose of Departmental adjudication, an amended location is one made in furtherance of an earlier valid location.

while a relocation is one which is adverse to the prior location.

2. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Location—Mining Claims: Relocation—Mining Claims: Withdrawn Land

An amended location notice generally relates back, where no adverse rights have intervened, to the date of the original location. To the extent, however, that an amended location merely furthers rights acquired by a valid subsisting location and does not embrace additional or new land, withdrawal of land subject to existing rights will not prevent the amended location from relating back to the original location.

3. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment—Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Location—Mining Claims: Recordation—Mining Claims: Relocation—Mining Claims: Withdrawn Land—National Park Service: Generally

Since an amended notice merges with the original notice, the filing of the amended notice, for purposes of recordation under either sec. 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information required by the applicable regulations, constitutes compliance with the recording requirements of those Acts.

4. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Location—Mining Claims: Relocation—Mining Claims: Withdrawn Land

Except for claims held under 30 U.S.C. § 38 (1976), a failure to record a mining claim as required by state law, coupled with a withdrawal of the land prior to any curative action, invalidates the claim, and thus precludes subsequent amendment of the claim.

5. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Location—Mining Claims: Relocation—Mining Claims: Withdrawn Land

An oral transfer of a mining claim, though contrary to the statute of frauds, will not serve to invalidate the claim, and a person subsequently seeking to record the claim will be afforded the opportunity to prove that the transfer actually occurred.

6. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Location—Mining Claims: Relocation—Mining Claims: Withdrawn Land

Where there are factual questions relating to whether action taken subsequent to a withdrawal is in the nature of an amendment or whether it constitutes a relocation, the mineral claimant will be granted the opportunity to show that the subsequent action was a permissible amendment.

APPEARANCES: R. Gail Tibbetts and Ray Tibbetts, pro sese.

*OPINION BY
ADMINISTRATIVE JUDGE
BURSKI*

*INTERIOR BOARD OF
LAND APPEALS*

R. Gail Tibbetts appeals from three decisions of the Utah State Office, Bureau of Land Management (BLM), each dated Aug. 28, 1978,

declaring various lode mining claims null and void *ab initio*.¹ Ray Tibbetts appeals from one of these decisions, AD-51-78. The State Office decisions recited that the various groups of claims had been located on Mar. 3, 1974, May 20, 1974, and Feb. 1, 1975. The decisions noted, however, that the claims were located upon land which had been included in the Glen Canyon National Recreation Area by the Act of Oct. 27, 1972, P.L. 92-593, 86 Stat. 1311, and had been placed under the administration of the National Park Service. The decisions also noted that the Act had withdrawn the land from location, entry, and patent under the mining laws.

The State Office held that since the claims were located after the passage of the Act withdrawing the land, the claims were null and void *ab initio*. The decisions recognized appellants' assertion that the locations were meant to be amended locations of earlier claims, but pointed out that nothing on the various location notices indicated that they were amendatory to prior locations.

[1] While a number of departmental, federal, and state court decisions have attempted to draw a distinction between relocation of a former claim and an amended location of such a claim, it is clear that nothing approaching uniformity has resulted. This confusion is understandable since it finds its germination in the 1872 Mining Act, itself. Sec. 5 of the Mining Act, *as amended*, 30 U.S.C. § 28 (1976)

contains the only reference to relocation:

On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year. * * * [A]nd upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to *relocation* in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. [Italics added.]

There was *no* reference in the original mining law of the United States to an "amended" location. The term "amended notice of location" was used in sec. 1 of the Act of Aug. 12, 1953, 30 U.S.C. § 501(a) (1976) and in sec. 1 of the Act of Aug. 13, 1954, 30 U.S.C. § 521(a) (1976) relating to mining claims originally located on lands which were embraced by either a mineral lease or a mineral lease application. The term, however, was not defined. It is in no small part due to this omission that the subsequent history of mining law adjudication has been mired in a seemingly endless sea of contradictory statements.

The difficulty arose virtually immediately as a number of states passed laws which permitted amended and additional certificates of location. See *Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co.*, 125 F. 389 (C.C.D. Nev. 1903). This was necessitated by the fact that it was not unusual for the original notice of location to contain various minor defects, particu-

¹The specific claims involved are set out subsequently in the text of this opinion.

October 5, 1979

larly as regards the actual physical location of the claim. Thus as early as 1885 the Federal courts recognized the right of the mineral locator to amend his location. See *McEvoy v. Hyman*, 25 F. 596 (C.C.D. Colo. 1885). It is interesting to note that at this early date, the court recognized, in interpreting the Colorado statute authorizing amended locations, that "[i]t is perhaps unfortunate that the question of amending a certificate and of changing the boundaries of claim, which amounts to a relocation, should be expressed in general terms relating to both subjects, and in one section of the law." *Id.* at 599-600. The court continued noting that the right of correction of the certificate of location had been recognized independently of statutes expressly authorizing amendments to certificates. See also *Fred B. Ortman*, 52 L.D. 467, 471 (1928). Moreover, the court opined that the proviso of the statute limiting its relation back to those situations in which no intervening rights had been initiated referred to the situation where the boundaries of the claim were changed, i.e., a relocation, and not to the amendment of a certificate of location. Accord, *Hagerman v. Thompson*, 68 Wyo. 515, 235 P.2d 750, 756 (1951); *Nichols v. Ora Tahoma Mining Co.*, 62 Nev. 343, 151 P.2d 615, 625 (1944). See also *Brattain Contractors, Inc.*, 37 IBLA 233 (1978).

Similarly, in a case styled *John C. Teller*, 26 L.D. 484 (1898), the Department held that an amended lo-

cation, permitted by Colorado State law was "made in furtherance of the original location and for the purpose of giving additional strength or territorial effect thereto, while [a relocation] is a new and independent location which can only be made where the original location and all rights thereunder have been lost by failure to make the necessary annual expenditure." *Id.* at 486.

A relocation is, by the terms of the statute, adverse to the original location, being permissible only where there has been a failure by the original locator to perform assessment work. See *Burke v. Southern Pacific R.R. Co.*, 234 U.S. 669, 693 (1914); *Belk v. Meagher*, 104 U.S. (14 Otto) 279, 284 (1881); *State of South Dakota v. Madill*, 53 L.D. 195, 200 (1930). Thus, unlike an amended location for which credit may be obtained for expenditures made on behalf of the original location (see *Tam v. Story*, 21 L.D. 440, 443-44 (1895)), moneys spent in the development of an original claim may not be applied to a relocated claim to fulfill the statutory requirement that \$500 be expended on development prior to the issuance of patent. See *Tough Nut No. 2 and Other Lode Mining Claims*, 36 L.D. 9 (1907); *Yankee Lode Claim*, 30 L.D. 289 (1900). A critical question, and one crucial to this case, is whether and in what circumstances an amended location relates back to the date of the original location.

For the purposes of this decision, we will define an "amended" location as a location which is made in

furtherance of an earlier valid location and which may or may not take in different or additional ground. The term "relocation" will be limited to those situations in which the subsequent location is adverse to the original location.²

[2] It will be seen that generally an amended location relates back, *where no adverse rights have intervened*, to the date of the original location. See Morrison, *Mining Rights*, 16th ed. (1936), at 159-163. Thus, in *Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Development Co.*, 134 F. 268 (1903), the Circuit Court for the District of Idaho noted: "It has long been held that a mining location may be amended without the forfeiture of any rights acquired by the original location, *except such as are inconsistent with the amendment, but new rights cannot be added which are inconsistent with those acquired by other locations made between the dates of the original and the amended location.*" *Id.* at 270. Additionally, there are certain circumstances in which an amended location notice will relate back to the date of the original notice even in the face of intervening adverse claims. Thus, it has been held that if the amended notice is made to cure obvious defects in the original notice without including any new grounds, it will relate back to the original notwithstanding in-

tervening locations. *McEvoy v. Hyman*, *supra*; *Gobert v. Butterfield*, 23 Cal. App. 1, 136 P. 516 (1913); *Bergquist v. West Virginia-Wyoming Copper Co.*, 18 Wyo. 270, 106 P. 673, 677-78 (1910).

While the *Bunker Hill* case notes that the amended location relates back to the extent it is not inconsistent with the intervening *rights* of others, it must be remembered that if the original claim was valid and was maintained in conformance with the law, the land embraced by the claim would not be open to the initiation of adverse *rights* (*Farrell v. Lockhart*, 210 U.S. 142 (1908)), and thus an amendment would of necessity relate back, provided no new land was included in the amendment. See generally *Waskey v. Hammer*, 223 U.S. 85 (1912); *Atherley v. Bullion Monarch Uranium Co.*, 8 Utah 2d 362, 335 P.2d 71 (1959). No amended location is possible, however, if the original location was void. See *Brown v. Gurney*, 201 U.S. 184, 191 (1906). A void claim would be one in which a locator has failed to comply with a material statutory requirement. *Flynn v. Vevelstad*, 119 F. Supp. 93 (D. Alaska 1954), *aff'd*, 230 F.2d 695 (9th Cir. 1956).

There is no doubt that withdrawal of land from mineral entry constitutes such an appropriation of the land as to prevent the initiation of new rights. See *Mark W. Boone*, 33 IBLA 32 (1977); *Lyman B. Crunk*, 68 I.D. 190, 194 (1961); *James M. Wells*, A-28549 (Feb. 10, 1961); *United States Phosphate Co.*, 43 L.D. 232 (1914). But to the extent

² No attempt will be made to reconcile the terminology used herein with all prior Departmental decisions for the simple reason that they are virtually irreconcilable. See generally *G. Reeves, Amendment v. Relocation*, 14 Rocky Mt. Min. Law Inst. 207 (1968).

that the amended location merely furthers rights acquired by a valid subsisting location, withdrawal of land subject to existing rights will not prevent the amended location. It should be emphasized, however, that the original claim must have been valid, and not voidable, in this situation. While it is true that a legal presumption arises in favor of a mineral claimant in possession and working the claim against the attempts of another claimant to enter upon the land and make a discovery, such presumption does not arise against the United States. *Brattain Contractors, Inc.*, *supra* at 238 and cases cited. See *Houch v. Jose*, 72 F. Supp. 6, 10 (S.D. Cal. 1947), *aff'd*, 171 F. 2d 211 (9th Cir. 1948). By withdrawing the land, the United States has prohibited the initiation of new claims and also prevented the curing of substantive defects in other claims.³

Thus, we hold that to the extent that an amended location, *i.e.*, one made in furtherance of an original location, merely changes a notice of location without attempting to enlarge the rights appurtenant to the original location, such amended location relates back to the original. Examples of such amended locations would be a change in the name of the claim (*Butte Consolidated Mining Co. v. Barker*, 35 Mont. 327,

89 P. 302, *aff'd on rehearing*, 90 P. 177 (1907); *Seymour v. Fisher*, 16 Colo. 188, 27 P. 240 (1891)), the exclusion of excess acreage so long as the original discovery point is preserved (see *Waskey v. Hammer*, *supra*), and a change in the record owners of a claim where such change is reflective of an existing fact (*United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 441 (9th Cir. 1971); *Thompson v. Spray*, 72 Cal. 528, 14 P. 182 (1887)).

[3] Finally, we would point out that if an amended claim had been filed, the recording of such amended claim under sec. 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or under sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information as is required by the applicable regulations, would constitute compliance with the Federal recording requirements since the two notices must be construed together. *Hagerman v. Thompson*, *supra*; *Bergquist v. West Virginia-Wyoming Copper Co.*, *supra*; *Giberson v. Tuolumne Copper Mining Co.*, 41 Mont. 396,

³ We note that 36 CFR 9.5 requires that various documentation, including the date of amendments and relocations, be filed on or before Sept. 28, 1977. A letter from the Assistant to the Regional Director, Rocky Mountain Region, National Park Service, to the Utah State Director, BLM, stated: "These mining claim locations were recorded *** in accordance with the provisions of [the Mining in the Parks Act]." We will, therefore, assume for the purposes of this decision that the appellants have otherwise complied with the recordation requirements of the Mining in the Parks Act.

³ We are aware that placer claimants have, in certain instances, been required both to obtain new land and relinquish land originally claimed in order to conform the claim to an official survey. Inasmuch as that fact situation is not presented herein, we need not determine whether, in these circumstances, the inclusion of new land operates as an exception to the general rule.

109 P. 974 (1910); *Duncan v. Fulton*, 15 Colo. 140, 61 P. 244 (1900).

Turning to the facts of the appeal before us, we note that the State of Utah, unlike many other Western States, does not have a specific statute permitting or regulating amended locations. The Supreme Court of Utah, however, has recognized the right of locators to amend. See *Cranford v. Gibbs*, 123 Utah 447, 260 P. 2d 870 (1953).

The three State Office decisions involved separate groups of claims. The decision in AD 49-78 involved the Copperspur Nos. 1-42, 61-118, inclusive, situated variously in secs. 1, 11, and 12, T. 29 S., R. 16 E., Salt Lake meridian; secs. 26 and 35, T. 28 S., R. 16 E., Salt Lake meridian; sec. 31, T. 28 S., R. 17 E., Salt Lake meridian; and secs. 5, 6, and 8, T. 29 S., R. 17 E., Salt Lake meridian. The decision in AD 50-78 involved the Jean Nos. 7-26, 28-48, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81-100, 103-120, inclusive, all situated in T. 36 S., R. 8 E., Salt Lake meridian. The decision in AD 51-78 involved the RG Nos. 101-126, 131-166, and 183-200, inclusive, all located in T. 36 S., R. 7 E., Salt Lake meridian. Appellants aver that all of these were amended locations of prior existing claims; we will examine each group separately.

The Copperspur group was recorded on June 13, 1974. The location certificates⁶ recited that they

⁶ While we will employ the term "location" notices, we do not mean to imply that these documents were not "amended location" notices. As we will explain, *infra*, we do not here decide whether these were, in fact, new location notices.

had been located on May 20, 1974, by R. Gail Tibbetts and one George Addison. The Copperspur Nos. 1-42, and 61-84, inclusive, overlies a group of claims known as the "Orange Claim Group." The Copperspur Nos. 85-118, inclusive, overlies a group of claims identified as the "Original 'Tibbetts' Claims." The Orange Claim Group was located in May 1955, alternatively by Robert G. Park and William J. Jones. The Original "Tibbetts" Claims were located in 1951 by Fred Frazier, Harold Provonsha, and Bill Tibbetts. Bill Tibbetts was the father of the appellants. Appellants contend that all interests in these claims were verbally transferred to Bill Tibbetts, who in turn verbally transferred all of the claims, in 1969, to R. Gail Tibbetts.

The Jean group was recorded on Apr. 2, 1974. The location certificates recited that they had been located on Mar. 3, 1974, by R. Gail Tibbetts and the Minerals Recovery Co. These claims were apparently subsequently transferred to the Blue Eagle Mining Co., by a mining lease and option executed in August 1977. The Jean group overlies various claims identified as the Colt Nos. 1-27, inclusive; the Circle "M" Nos. 1, 3, 5, 9, 11-17, inclusive; the Circle "X" Nos. 1-20, inclusive; the Circle "Y" Nos. 1-20, inclusive; and the Circle "Z" Nos. 1-20, inclusive.⁷ The

⁶ Because of the multiplicity of claim names, we will use the terms "Orange Claim Group" and "Original 'Tibbetts' Claims" since they were referred to as such in appellants' submissions to the Department.

⁷ Certain Jean claims overlie certain Circle "Z" claims which are not the subject of this appeal. Those Jean claims are Nos. 62, 64, 66, 68, 70, 72, 74, 76, 78, and 80.

Colt claims were located in 1966 and 1967. The various Circle claims, with the exception of the Circle "M" group, were located in 1967. R. Gail Tibbetts was co-locator of all of the claims located in 1966 and 1967. Various other parties, however, were co-locators of all of these claims as well. The Circle "M" group was apparently located by an individual named Wilcox in 1954.⁸ Moreover, it appears that the Jean Nos. 7-20, inclusive, do not merely overlie prior claims; rather, they apparently encompass various parts of individual Circle "M" claims and other parts of the Circle "X" claims Nos. 1 and 2.⁹ Appellants contend that, in 1969, through certain verbal mesne conveyances, R. Gail Tibbetts and Mineral Resources Co. acquired all the interests of the other locators.¹⁰

The RG group was recorded on Feb. 20, 1975. The location certificates recited that they had been located on Feb. 1, 1975, by Ray Tibbetts and R. Gail Tibbetts. These claims were also apparently transferred to the Blue Eagle Mining Co. by a mining lease and option executed in 1977. The RG claims overlie various claims identified as the Choprock Nos. 501-549, 574-595, and 600-607, and the Chet Nos. 1 and 2. These claims were located in 1967, by differing groups of co-

locators, some of which included R. Gail Tibbetts.¹¹ Apparently, the Choprock Nos. 574-595 were never recorded. The RG Nos. 131-152 overlie these claims. Additionally, the Choprock No. 533 and the Chet No. 1 covered the same ground. Appellants contend that all co-locators verbally transferred their interests in these claims to them in 1969.

[4] There exist a few subsidiary issues with which we will deal prior to the examination of the main issue involved in this appeal. We noted, *supra*, that the Choprock Nos. 574-595, inclusive, were apparently never recorded. The applicable Utah statute provides:

Within thirty days after the date of posting the location notice upon the claim, the locator or locators, or his or their assigns, must file for record in the office of the county recorder of the county in which such claim is situated a substantial copy of such notice of location.

Utah Code Ann. (1953) 40-1-4.

In *Atherley v. Bullion Monarch Uranium Co.*, *supra*, the Utah Supreme Court held that the failure to record a notice of relocation, therein termed an "amended location," did not work a forfeiture of the claim. The court held that "title to a mining claim is * * * initiated by discovery and segregation both of which requirements were performed in this case. An estate immediately vested and the Utah law does not provide for a forfeiture for failure to record." 335 P.2d at 74. As a result of this analysis, the court ruled that a subsequent loca-

⁸ We have also been unable to find any copies of the original location notices for the Circle "M" group of claims. Additionally, there is no recitation in appellants' submissions concerning how they acquired title to these claims.

⁹ See n. 14, *infra*.

¹⁰ See n. 8, *supra*.

¹¹ Many of the location notices show that various co-locators' names had been scratched out.

tor, *with knowledge* of the original locator's related claim, could not enter the land for the purpose of establishing a mining claim thereon. The court, however, expressly noted that this rule was not applicable vis-a-vis the United States, citing *Houck v. Jose, supra*.

In conformity with this interpretation, we hold that while the failure to record the mining claim as required by Utah State law does not, in and of itself, render the claim invalid, the withdrawal of the premises by the United States, prior to any corrective action by the claimant, would serve to nullify the claim.¹² The 1972 withdrawal thereby invalidated the Choprock Nos. 574-595, inclusive. Accordingly, the RG Nos. 131-152, inclusive, which were allegedly based on the Choprock Nos. 574-595, were null and void ab initio, since they were either located when the land was withdrawn or, if deemed to be amended locations, sought to amend claims which were already void.

[5] The next question which we must consider relates to the fact that all of the transfers to appellants were verbal. Under Utah law, the right to a mining claim is an interest in real property, which may pass by deed. *Lavagnino v. Uhlig*, 26 Utah 1, 71 P. 1046, 1051 (1903), *aff'd*, 198 U.S. 443 (1905). Moreover, the Utah Supreme Court has spe-

cifically held that the statute of frauds applies to an interest in a mining claim. *Woolley v. Wycoff*, 2 Utah 2d 329, 273 P.2d 181, 183 (1954). The Utah statute of frauds contains a provision that certain transactions which are required by the statute to be committed to writing are void if they are not. Transfer of real estate, except by an agent, is not listed therein. *See Utah Code Ann. (1953) 25-5-4*. The question, therefore, is whether the failure to commit to writing an alleged transfer of a mining claim from the original locators and co-locators necessarily nullifies an amended location. We do not believe that it does.

The statute of frauds is intended for the benefit of the parties to an unwritten agreement "being designed to enable parties to certain types of transactions to escape liabilities and duties assumed orally but not in writing." *Mustard v. United States*, 155 F. Supp. 325, 332 (Ct. Cl. 1957). For this reason, it has been held that strangers to the agreement cannot plead the statute. *Livingston v. Thornley*, 74 Utah 516, 280 P. 1042, 1045 (1929). Even when the statute provides that an agreement is void, the general rule is that it is merely voidable at the option of a party to the agreement. *See Ford Motor Co. v. Hotel Woodward Co.*, 271 F. 625, 627-28 (2d Cir. 1921).

In light of the above, we hold that the fact that transfers of mining claims are oral and not committed to writing does not, *is po facto*, invalidate a subsequent amended location notice. Since the United States

¹² The period of time for holding property by adverse possession under Utah law is 7 years. Utah Code Ann. 78-12-5 *et seq.* (1953). Therefore, appellants could not have initiated a claim under 30 U.S.C. § 38 (1976) prior to the effective date of the withdrawal. *Cf. United States v. Guzman*, 18 IBLA 109, 81 I.D. 685 (1974).

is essentially a stranger to the agreement, the fact that the agreement may be subject to the statute of frauds should not be used to invalidate the claim. This rule is in conformity with another well-established rule in the mining laws that the omission of a co-locator's name in an amended notice is only subject to the objection of the co-locator whose name has been omitted.¹³ *Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co.*, *supra*; *Thompson v. Spray*, *supra*. We also hold, however, that the failure to commit a transfer of a mining claim to writing does give rise to a question of fact into which the Department may properly inquire.

[6] Thus, we reach the question which is essential to this appeal: were the actions variously taken in 1974 and 1975 in the nature of "amended" notices of location, or were they relocations made after the land had been withdrawn?

The decision of the State Office noted that nothing on the face of the notices for the Copperspur, Jean, and RG claims indicated that these were amended notices or even relocations. This is true. There is no absolute requirement, however, that an amended location or a relocation state that this is its purpose on its face.

The general rule is that an "amended" certificate need not state

the specific purpose of the amendment. *See Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co.*, *supra* at 397; *Johnson v. Young*, 18 Colo. 625, 34 P. 173 (1893); *Lindley on Mines* (1897) at § 398. We have been unable, however, to discover any court case dealing with an alleged amended certificate or location in which the documents do not, on their face, indicate that they are amended or additional location notices. We feel that while this omission does not inevitably lead to the conclusion that no amended location was intended, it does properly give rise to an inference that such was not the intent. *See The Heirs of M. K. Harris*, 42 IBLA 44 (1979).

In *United States v. Consolidated Mines & Smelting Co.*, *supra*, the Ninth Circuit Court of Appeals noted that the appellant:

[C]laimed that some of its location notices were actually relocation notices. This contention was dismissed by the Department with the observation that relocation is necessarily adverse to the interests of prior locators. Thus, the Department concluded, Consolidated's rights in its mining claims must date from the "relocation" notices filed after the withdrawal. This generalization is correct only if the relocater claims against, rather than through, the prior locator. *If a relocater claims through the prior locator, ordinarily the relocation notice relates back.* * * * The evidence before the Department did not indicate whether Consolidated claimed through or against its predecessors. Thus, the Department's generalization is supported only by an unjustifiable assumption of fact. Accepting arguendo Consolidated's status as a relocater, hearings would have been desirable to ascertain the relationship between Consolidated's relocations and prior loca-

¹³ We would note, however, that the exclusion of one of eight co-locators of an association placer claim for 180 acres, without the substitution of an additional co-locator, permits the Department to properly inquire into the existence of a discovery as of the time of the amendment. *See, e.g., United States v. Harenberg*, 9 IBLA 77 (1973).

tion made by persons through whom Consolidated claimed.

Given a disputed issue of fact, hearings were required before the Department could declare Consolidated's claims null and void. [Italics supplied.]

455 F. 2d 432, at 441.

We believe that this precedent is applicable herein. A number of problems have been delineated above. First, there is a question whether appellants obtained title to the mining claims prior to the 1974 locations. Second, there is a question whether the 1974 actions were intended to be amendments of the prior location, relocations, or new locations. These matters are best determined at a hearing.

We also note that appellants contend that they relied on the advice of a National Park Service employee, one Harold Ellingson, in their actions, particularly in the recordination of the claims. It is axiomatic that regardless of the validity of the 1974 locations, nothing in the decision below adversely affected the prior locations. However, since these prior locations were not recorded, they would now be void under sec. 8 of the Mining in the Parks Act, 90 Stat. 1343, 16 U.S.C. § 1907 (1976).

The circumstances in which estoppel will lie against the Government are of a very limited nature. We do not now decide whether, if it could be proved that appellants were misled as to which claims should be recorded, estoppel would lie herein. It is sufficient to note that inasmuch as we are referring the matter to the Hearings Division for the assignment of an Administrative Law

Judge, the hearing should include an inquiry into this question, so that we may resolve any future question without substantial factual uncertainties. Insofar as the testimony of Ellingson would be critical to such determinations, we request that provision be made for his appearance.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as regards the RG Nos. 131-152, and set aside as to all other claims, and the case files for such claims are hereby referred to the Hearings Division for the assignment of an Administrative Law Judge who will conduct a hearing inquiring into the matters set out in the text.¹⁴ The appellants will have the burden of

¹⁴ In addition, we noted in the text that Jean Nos. 7-20 embrace parts of various prior claims. This raises a difficult factual problem. If it was intended that the Jean location notices for those claims serve as amended notices of location, they constitute, in effect, attempts to acquire new land vis-a-vis the earlier locations. As an example, let us assume that original claims A and B, each embrace 80 acres, consisting respectively of the E½ NW¼ for claim A, and the W½ NW¼ for claim B, are amended to read the N½ NW¼ for claim A, and the S½ NW¼ for claim B. The inclusion in claim A of the NW¼ NW¼ and the inclusion in claim B of the SE¼ NW¼ entails the acquisition of new land to those two claims. Such inclusion is impermissible in the face of an intervening withdrawal of land. Thus, in our example, the NW¼ NW¼ of claim A and the SE¼ NW¼ of claim B would be null and void ab initio. Moreover, if the only point of discovery in claim A had been located in the SE¼ NW¼ the exclusion of the discovery point would also invalidate the NE¼ NW¼. See *Waskey v. Hammer*, *supra*. The record before us is inadequate to make the factual determinations necessary to determine which portions, if any, of the Jean Nos. 7-20 may be valid. We therefore request that the appellants present evidence on this point and that the Administrative Law Judge determine this question initially.

October 5, 1979

showing that the 1974 and 1975 location notices were amended locations rather than new locations or relocations. The Judge will issue an initial decision which may be appealed by any party adversely affected.

JAMES L. BURSKI,
Administrative Judge.

I CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

ADMINISTRATIVE JUDGE GOSS
CONCURRING:

I concur in the majority analysis, except in two respects.

I submit that the inference to be drawn from failure to designate an alleged amended location notice as "amended" should be more limited. The inference that there was no intent to "relocate" rather than to amend should apply only (1) where the locators on the new document are not the same or successors to those on the prior document, or (2) where there has been a lapse in required assessment work. If the parties are not in privity, an adversary relationship can be presumed, at least to the extent of the differences. If assessment work is not performed, an abandonment by the locator and a "relocation" is a possibility.

While I concur that the specified BLM decision should be set aside, I would remand to BLM, rather than to the Hearings Division, for further proceedings. The contemplated hearing could prove costly,

time-consuming, and possibly unnecessary. Appellants have not applied for the 261 patents and application may never be made. BLM is burdened with the implementation of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-82 (1976) and other matters. Therefore, in the interest of administrative convenience and economy, BLM should be given authority to chart its course. The Board should rule that the claims are not to be declared void ab initio without the hearing specified. Among the options available to BLM would be the following: (1) the scheduling of the withdrawal hearing; (2) recognition of the later locations as amended locations of claims prior to the withdrawal; (3) reservation of the question of validity of the later locations as amendments until a later time or until the question is precipitated as to a particular claim by an application for patent; and (4) review of the claims to determine whether any contests should be brought and to determine whether such a contest could be any less burdensome than the hearing on the withdrawal.¹

JOSEPH W. GOSS,
Administrative Judge.

¹ While I do not mean to imply a contest would be appropriate, neither should a contest prior to a withdrawal hearing be precluded by the Board. One question concerns the 99 claims in the Copperspur group, which appellants state were located on May 20, 1974; a preliminary inquiry on this matter would seem appropriate. See *United States v. Zweifel*, 11 IBLA 53, 80 I.D. 323 (1973), *sustained sub nom. Roberts v. Morton*, 549 F.2d 158 (10th Cir. 1977), *cert. denied sub nom. Roberts v. Andrus*, 434 U.S. 834 (1977).

SQUIRE BAKER**1 IBSMA 279**Decided *October 25, 1979*

Appeal from a decision of Administrative Law Judge David Torbett dated June 1, 1979, vacating two cessation orders and one notice of violation issued by the Office of Surface Mining Reclamation and Enforcement pursuant to the Surface Mining Control and Reclamation Act of 1977 (Docket No. NX 9-25-R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally

Where excavation work has taken place and coal exposed, but no coal removed, and the landowner's intent is to create homesites and not to remove coal unless permission to do so is received from the state, the Office of Surface Mining Reclamation and Enforcement lacks jurisdiction over the land.

APPEARANCES: Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee; Shelley D. Hayes, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for appellant, the Office of Surface Mining Reclamation and Enforcement; John T. Aubrey, Esq., Manchester, Kentucky, for appellee, Squire Baker.

**OPINION BY INTERIOR
BOARD OF SURFACE
MINING AND RECLAMATION
APPEALS**

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from a decision of Administrative Law Judge (ALJ) David Torbett dated June 1, 1979, vacating two cessation orders and a notice of violation issued pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).¹

On Nov. 8, 1978, two OSM inspectors visited a site located in Clay County, Kentucky. Following the inspection OSM issued Notice of Violation No. 78-II-10-9 and Cessation Order No. 78-II-10-4.² The permittee or operator listed on the notice and the order was Hardly Able Coal Co. OSM returned to the site in January 1979 and issued Cessation Order No. 79-II-10-1 for failure to abate the violations listed in the previous notice. Hardly Able Coal Co. was again listed as the permittee or operator. Subsequently, both orders and the notice were modified to substitute Squire Baker for Hardly Able Coal Co. as the permittee or operator. Baker sought review of the orders and the notice by filing an application for review pursuant to sec. 525(a)(1) of the Act. 30 U.S.C. § 1275(a)(1) (Supp. I 1977).

A hearing was held on Apr. 17 and on June 1, 1979, the ALJ vacated the orders and the notice. He ruled that OSM did not have juris-

¹ 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

² The notice listed two violations—mining within 300 feet of an occupied dwelling and failure to post appropriate signs and markers. Three violations were detailed in the order—mining without a state permit, failure to pass drainage through sedimentation ponds, and mining within 100 feet of the outside right-of-way of a public road.

diction over the site. He found that despite the fact that the site had been excavated and the coal exposed, no coal had been removed and Baker did not intend to mine coal unless the state issued him an onsite construction permit.

After examining the Act, the regulations, and the record in this case, we are compelled to agree with the ALJ.

Discussion

The facts as set forth below are most important to the result reached in this case. Squire Baker owned the land in question and wanted to develop it to create homesites for his children (Tr. 70-74). He was aware that the land was underlaid with coal, and desiring to remove the coal in order to establish solid building foundations for the houses, he filed an application with the State of Kentucky seeking an onsite construction permit (Tr. 74-75; Exh. A-2). No excavation was undertaken until after Baker had applied for the permit (Tr. 105). Baker contracted with his son-in-law, who worked for Hardly Able Coal Co., to perform the excavation work on the site (Tr. 76-77). Under Baker's direction Hardly Able Coal Co. began excavating the site on Oct. 10 or 11, 1978 (Tr. 103, 104). Excavation of the site was halted when the coal seam was exposed (Tr. 103). No coal had been mined at the time the enforcement actions were taken by OSM nor had any coal been mined at the time the ALJ held the hearing in this case.

While there was testimony at the hearing to indicate that Baker's onsite construction permit application had been denied on Jan. 21, 1979, he had not removed any coal from the site and he stated that he did not intend to mine any coal until he had permission to do so (Tr. 79, 81, 99). Baker's primary intent was to create homesites. Although he had a secondary intent to remove the coal, his intent to remove coal was conditioned upon his receiving permission to do so from the state (Tr. 81).

[1] OSM argues that Baker's activities are subject to OSM's jurisdiction because those activities are encompassed by the definition of "surface coal mining operations" contained in the regulations at 30 CFR 700.5 and in virtually identical language in sec. 701(28) of the Act, 30 U.S.C. § 1291(28) (Supp. I, 1977). The specific language of 30 CFR 700.5 upon which OSM relies reads as follows:

Surface Coal Mining Operations means: (1) Activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of Section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. *Such activities include excavation for the purpose of obtaining coal * * *.* [Italics added.]

OSM contends that regardless of whether Baker's intent to remove coal was primary or secondary, the excavation work performed on his land was for the purpose of obtaining coal. We disagree. The excava-

tion work was undertaken with the expressed intention to create homesites. It was only if and when he received state permission that Baker would have removed any coal. He had not received permission at the time of the ALJ's hearing and he had not removed any coal. We therefore conclude that under these facts OSM did not have jurisdiction over his land.

OSM also states that the ALJ relied on the Board's holding in *Dennis R. Patrick*, 1 IBSMA 158, 86 I.D. 266 (1979), to exclude Baker from the jurisdiction of the Act. OSM argues that Baker is not exempt on the basis of *Patrick* because, as explained further in *James Moore*, 1 IBSMA 216, 86 I.D. 369 (1979), only publicly financed construction projects are exempt from the Kentucky coal mining regulations or the Federal initial regulations.

As stated in *Patrick* and *Moore*, during the initial regulatory program the critical factor in determining whether OSM has jurisdiction over a surface coal mining operation conducted on state land is whether the operation is subject to state regulation within the scope of any of the initial Federal performance standards. However, as set forth above, under the facts of this case Baker was not conducting surface coal mining operations and, therefore, the "subject to state regulation" inquiry is not relevant.

All motions heretofore not ruled on are denied and the ALJ's decision in this case is affirmed.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

June 25, 1979

**FEDERAL WATER RIGHTS OF THE
NATIONAL PARK SERVICE, FISH
AND WILDLIFE SERVICE, BUREAU
OF RECLAMATION AND THE
BUREAU OF LAND MANAGEMENT***

M-36914

June 25, 1979

Water and Water Rights: Generally

By acquisition of the lands now comprising the Western States, the United States acquired all rights appurtenant to such lands, including water rights.

**Constitutional Law: Generally—Water
and Water Rights: Generally**

Under the Property Clause, Congress has the power to control the disposition and use of water on, under, or appurtenant to original public domain lands, and it is not lightly inferred that this power has been exercised.

Water and Water Rights: Generally

To the extent Congress has not clearly granted authority to the States over waters which are in, on, under, or appurtenant to Federal lands comprising the public domain and reserved public domain, the Federal Government maintains its sovereign rights in such waters and may put them to use irrespective of State law.

**Constitutional Law: Generally—Water
and Water Rights: Generally**

Federal control over the disposition and use of water in, on, under or appurtenant to Federal land ultimately rests on the Supremacy Clause, which permits the Federal Government to exercise its constitutional prerogatives without regard to State law.

*Not in chronological order.

Water and Water Rights: Generally

The admission of a State into the Union and the "equal footing" doctrine did not divest the United States of its plenary control over waters which are in, on, under, or appurtenant to Federal lands comprising the public domain and reserved public domain.

Water and Water Rights: Generally

Federal control over its needed water rights, unhampered by compliance with procedural and substantive State law, is supported by the Supremacy Clause and the doctrine that Federal activities are immune from State regulation unless there is specific congressional action providing for State control.

Water and Water Rights: Generally

Originally, the common law riparian rules of natural flow applied to the public lands; these riparian rules could be changed by State legislatures only if such changes did not impair the right of the United States to the continued flow of water bordering its lands needed for the beneficial use of Government property, or if the Congress expressly consented.

Water and Water Rights: Generally

Three Federal statutes provide the general basis for State regulatory authority over water rights: Act of July 26, 1866, § 9, 14 Stat. 253; Act of July 9, 1870, § 17, 16 Stat. 218, 43 U.S.C. § 661 (1976); and the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 *et seq.* (1976).

Water and Water Rights: Generally

The Act of July 26, 1866, § 9, 14 Stat. 253, and the Act of July 9, 1870, § 17, 16 Stat. 218, 43 U.S.C. § 661 (1976), sanctioned private possessory rights to water on the public lands asserted under local laws and customs; Congress in effect waived its

proprietary and riparian rights to water on the public domain to the extent water is appropriated by members of the public under State law in conformance with the grant of authority found in these two Acts, and Congress thereby confined the assertion of inchoate Federal water rights to unappropriated waters that exist at any point in time.

Water and Water Rights: Generally

Supreme Court *dicta* concerning the effect of the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 *et seq.* (1976), on Federal water rights are some what at war with each other; but Supreme Court decisions upholding Federal reserved water rights must mean that the Desert Land Act of 1877 did not divest the United States of its authority, as sovereign, to use the unappropriated waters on the public lands for governmental purposes.

Water and Water Rights: Generally

Since the Federal Government has never granted away its right to make use of unappropriated waters on Federal lands, the United States retains the power to vest in itself water rights in unappropriated waters on, in, under, or appurtenant to Federal lands, and it may exercise such power independent of substantive State law.

Water and Water Rights: Federal Appropriation

The United States has the right to appropriate water on its own property for congressionally authorized uses, which right arises from actual use of unappropriated water by the United States to carry out congressionally authorized management objectives on Federal lands, but may not predate in priority the date action is taken leading to an actual use, and it may not adversely affect other rights previously established under State law.

Water and Water Rights: Federal Appropriation

The appropriation of water by the Federal Government for authorized Federal purposes cannot be strictly limited by State substantive law; for example, by what State law says is a "diversion" of water or a "beneficial use" for which water can be appropriated.

Water and Water Rights: State Laws

Since Congress has not generally directed the Federal Government to comply with State water law, such compliance is required only in those specific instances where Congress has so provided, but in the converse, Congress has not prohibited the United States from voluntarily complying with such State water laws.

Water and Water Rights: State Laws

State law should be followed to the greatest practicable extent in acquiring Federal water rights. This includes following State procedural law in all cases involving appropriation of non-reserved water rights and State substantive law where that law recognizes the Federal appropriative right in all pertinent respects.

Water and Water Rights: Federally Reserved Water Rights

When the Federal Government withdraws land from the public domain and reserves it for a Federal purpose, by implication, it reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation, and the reserved water right vests on the date of the reservation and is superior to the rights of future appropriators.

Water and Water Rights: Federally Reserved Water Rights

The intent to reserve water is inferred if previously unappropriated water is necessary to accomplish the purposes for

which the land reservation is created, but where water is only valuable for a secondary use of the reservation there arises a contrary inference that the United States would acquire water in the same manner as other public or private appropriators.

Water and Water Rights: Federally Reserved Water Rights

The priority date of the Federal reserved water right for purposes of determining seniority of water rights relative to those obtained under State or other Federal law is the date of the Federal reservation or withdrawal action initiated towards a reservation.

Water and Water Rights: Federally Reserved Water Rights

The volume and scope of particular reserved water rights are Federal questions, calling for the application of Federal law; State law requirements such as notice of application to beneficial use and restrictions on beneficial use are not applicable to reserved water rights.

Water and Water Rights: Federally Reserved Water Rights

Reserved water rights encompass both existing and reasonably foreseeable future water uses necessary to fulfill the purposes of the reservation.

Water and Water Rights: Federally Reserved Water Rights

While persuasive arguments can be made for and against the application of reserved water rights on acquired lands, it is the policy of this Department to obtain water rights for acquired lands through means other than the assertion of a reserved water right.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

For purposes of the Executive Order of Apr. 17, 1926, the term "spring" means a discrete natural flow of water emerging from the earth at a reasonably distinct location, whether or not such flow constitutes a source of or is tributary to a water course, pond, or other body of surface water. The term "waterhole" means a dip or hole in the earth's surface where surface or groundwater collects and which may serve as a watering place for man or animals.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

The Executive Order withdrew, as of Apr. 17, 1926, all lands containing important springs and waterholes that existed as of that date on unappropriated, unreserved public lands.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: State Laws

The Executive Order does not affect a valid, private right to use some or all of the waters of such a source that vested under the applicable State laws, custom or usage prior to Apr. 17, 1926.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

The Executive Order does not withdraw artificially developed sources of water or manmade structures for collection of water on the public domain. However, any interest held in those artificially developed or constructed sources or structures passes to the United States upon abandonment by the developer or his suc-

cessor in interest by virtue of the United States' ownership of the lands.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

The Executive Order withdraws, by operation of law, lands which become of the character contemplated in the Order subsequent to the date of the Order; *i.e.*, vacant, unappropriated, unreserved public lands upon which springs or waterholes come into existence after Apr. 17, 1926.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: State Laws

The Executive Order withdraws, by operation of law, any vacant, unappropriated, unreserved public land upon which is located a spring or waterhole and for which a private vested right to use all of such water under applicable State law, custom and usage has previously existed upon abandonment or forfeiture of that State water right under the terms of the applicable State law, custom or usage.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

The Executive Order withdraws all lands containing springs or waterholes as defined and subject to the limitations set forth above, regardless of whether the water source has been the subject of an official finding as to its existence and location.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

The priority date for the public right to use the waters of a spring or waterhole withdrawn under the Order is Apr. 17, 1926, for all public springs and waterholes existing on that date. Those public springs and waterholes that naturally come into existence at a later date are

withdrawn when they come into existence.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Rights-of-Way

Any action taken by private party who did not have a vested State water right prior to Apr. 17, 1926, or had not received appropriate permission from the United States subsequent to that date to make use of the public waterhole or spring withdrawn by the Order is a nullity and of no force and effect. Any entry onto the reserved land for such purpose constitutes a trespass.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

The purposes for which water is reserved under the 1926 Order are (a) stockwatering, (b) human consumption, (c) agriculture and irrigation, including sustaining fish, wildlife and plants as a food and forage source, and (d) flood, soil, fire and erosion control.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

Because the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.* (1976), repealed both authorizing statutes under which the Apr. 17, 1926, Order was issued, springs and waterholes on the public domain coming into existence after Oct. 21, 1976, are not withdrawn by the Apr. 17, 1926, Order but must be withdrawn under other, still existing legislative authority to be effective.

Water and Water Rights: Federally Reserved Water Rights

The Act of June 16, 1934, 30 U.S.C. § 229a (1976), creates a reserved right when an oil and gas prospecting permittee or lessee strikes water "of such quality and

quantity as to be valuable and usable at a reasonable cost for agriculture, domestic, or other purposes" as found by the Secretary.

Water and Water Rights: Federally Reserved Water Rights—Withdrawals and Reservations: Powersites

The withdrawals of lands for powersites under 43 U.S.C. § 141 (1970) do not carry with them reserved water rights for purposes under the administration of the Department of the Interior, simply because of their reservation as a powersite.

Water and Water Rights: Federally Reserved Water Rights—Withdrawals and Reservations: Stock-Driveway Withdrawals

Water sources located within stock driveways and reserved pursuant to sec. 10 of the Act of Dec. 29, 1916, 43 U.S.C. § 300 (1970), are reserved to the extent necessary to provide for stockwatering during the process of moving livestock through these reserved access corridors.

Oil Shale: Withdrawals—Water and Water Rights: Federally Reserved Water Rights

Oil shale withdrawals administered by the Department of the Interior have reserved water rights for the purposes of investigation, examination and classification of those lands. Water is not reserved for actual oil shale development.

Taylor Grazing Act: Generally—Water and Water Rights: Federally Reserved Water Rights

The Taylor Grazing Act created no reserved water rights.

Oregon and California Railroad and Reconveyed Coos Bay Grant Lands:

Generally—Water and Water Rights: Federally Reserved Water Rights

There are no reserved water rights on the revested Oregon and California Railroad lands and the Coos Bay Wagon Road lands, the "OSC" lands.

Classification and Multiple Use Act of 1964—Water and Water Rights: Federally Reserved Water Rights

Classification of lands under the Classification and Multiple Use Act of 1964, 43 U.S.C. § 1411 *et seq.* (1970), does not create reserved water rights.

Water and Water Rights: Federally Reserved Water Rights—Wild Free-Roaming Horses and Burros Act

Designation of lands as sanctuaries for wild, free-roaming horses and burros under the Act of Dec. 15, 1971, 16 U.S.C. § 1333 *et seq.* (1976), does not reserve water for the purposes of wild horse and burro drinking.

Water and Water Rights: Federally Reserved Water Rights—Wild and Scenic Rivers Act

Rivers administered by BLM that have been designated as components of the Wild and Scenic Rivers System under 16 U.S.C. §§ 1271-1287 (1976) carry with them reserved water rights sufficient to fulfill the purposes of the Act.

Federal Land Policy and Management Act of 1976: Generally—Water and Water Rights: Federally Reserved Water Rights

The Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* (1976), does not establish any reserved rights in BLM lands.

Reclamation Lands: Generally—Water and Water Rights: Federally Reserved Water Rights

Sec. 8 of the 1902 Reclamation Act, 43 U.S.C. § 372 *et seq.* (1976), prohibits the Bureau of Reclamation from claiming any reserved water rights for any reclamation project unless the terms of any project authorization subsequent to 1902 can fairly be read to provide for a reservation of water.

National Park Service Areas: Water Rights—Water and Water Rights: Federally Reserved Water Rights

The particular reserved water rights for national park and national monument areas include water required for scenic, natural, and historic conservation uses; wildlife conservation uses; sustained public enjoyment uses; and National Park Service personnel uses; all of which are intimately related to the fundamental purpose for park and monument reservation, as articulated in 16 U.S.C. § 1 (1976).

National Park Service Areas: Water Rights—Water and Water Rights: Federally Reserved Water Rights

Among other reserved water rights for national parks and national monuments, 16 U.S.C. § 1 (1976), encompasses reserved water rights for concession uses to provide sustained public enjoyment and reserved water rights for waterborne public enjoyment and recreation.

National Park Service Areas: Water Rights—Water and Water Rights: Federally Reserved Water Rights

Congress has taken no action subsequent to the National Park Service Organic Act of Aug. 25, 1916, 39 Stat. 535, 16 U.S.C. § 1 (1976), to negate the implied intent contained in the Organic Act that all unappropriated waters necessary to fulfill

the purposes of park areas are reserved as of the date of the enabling legislation.

National Park Service Areas: Generally

The Act of Mar. 27, 1978, 92 Stat. 166, 16 U.S.C.A. § 1a-1 (West Supp. 1979), provides that actions taken in derogation of park values and purposes shall not be authorized unless specifically provided by Congress, in order to ensure that the resources and values of areas in the National Park System are afforded the highest protection and care in governmental decisions.

National Park Service Areas: Water Rights—Water and Water Rights: Federally Reserved Water Rights

The discretionary authority contained in the Act of Aug. 7, 1946, 60 Stat. 885, 16 U.S.C. § 17j-2(g) (1976), authorizing the the National Park Service to acquire water rights in accordance with local laws, is not inconsistent with the assertion of the reserved water rights principle and is readily distinguishable from Acts requiring deference to State water law.

National Park Service Areas: Water Rights—Water and Water Rights: Federally Reserved Water Rights

As a general rule, the above-developed reserved water rights apply to components of the National Park System other than national parks and national monuments, though the extent of particular reserved water rights must be determined on a case-by-case basis, involving an interpretation of 16 U.S.C. § 1 (1976) and the establishing legislation.

Water and Water Rights: Federally Reserved Water Rights—Wildlife Refuges and Projects: Riparian Rights

Executive branch reservations for native bird preserves, migratory bird refuges, game ranges, fish hatcheries, elk refuges and similar refuges and preserves reserved sufficient water needed for the

June 25, 1979

maintenance of the species (e.g., ecosystem food supply, breeding habitat, fire protection, domestic needs of Fish and Wildlife Service personnel) mentioned in the executive orders establishing the individual reservations.

Water and Water Rights: Federally Reserved Water Rights—Wildlife Refuges and Projects: Riparian Rights

Executive branch refuge reservations superimposed on areas previously withdrawn for powersites, reclamation or other purposes obtain reserved water rights necessary to fulfill the specific purposes for the refuge reservations.

Water and Water Rights: Federally Reserved Water Rights—Wildlife Refuges and Projects: Riparian Rights

Wildlife Refuge uses authorized by the Refuge Receipts Act of 1935, 49 Stat. 383, 16 U.S.C. § 715s(f) (1976); the Refuge Recreation Act of 1962, 76 Stat. 653, 16 U.S.C. §§ 460k-460k-4 (1976); and the National Wildlife Refuge Administration Act of 1966, 80 Stat. 927, 16 U.S.C. §§ 668dd-668ee (1976), such as public recreational uses, do not obtain reserved water rights under existing precedent.

Water and Water Rights: Federally Reserved Water Rights—Wild and Scenic Rivers Act

The Wild and Scenic Rivers Act, 82 Stat. 917, 16 U.S.C. § 1284(c) (1976), contains an express, though negatively phrased, assertion of Federal reserved water rights.

Water and Water Rights: Federally Reserved Water Rights—Wild and Scenic Rivers Act

The extent of the water reserved for wild and scenic rivers is the amount of unap-

propriated water necessary to protect the particular aesthetic, recreational, scientific, biotic or historical features which led to the river's inclusion as a component of the National Wild and Scenic Rivers System, and to provide public enjoyment of such values.

Water and Water Rights: Federally Reserved Water Rights—Wild and Scenic Rivers Act

Designation of wild and scenic rivers does not automatically reserve the entire unappropriated flow of the river and an examination of the individual features which led to each component river's designation must be conducted to determine the extent of the reserve water right.

Water and Water Rights: Federally Reserved Water Rights—Wilderness Act

Areas which are congressionally designated as wilderness under the Wilderness Act of Sept. 3, 1964, 78 Stat. 890, 16 U.S.C. § 1131 *et seq.* (1976), obtain reserved water rights for the maintenance of minimum stream flows and lake levels (e.g., for science appreciation and primitive water-borne recreation) and for ecological maintenance (e.g., evapotranspiration for natural communities, wildlife watering, firefighting).

Federal Land Policy and Management Act of 1976: Generally—Taylor Grazing Act: Generally—Water and Water Rights: Federal Appropriation

The management programs mandated by Congress in such Acts as the Taylor Grazing Act and FLPMA require the appropriation of water by the United States in order to assure the success of the programs and carry out the objectives established by Congress.

Federal Land Policy and Management Act of 1976: Generally—Water and Water Rights: Generally

Sec. 701(g) of FLPMA, 43 U.S.C. § 1701 notes (1976), maintains the status quo in the relationship between the States and the Federal Government on water, and allows for (a) the continued appropriation of unappropriated nonnavigable waters on the public domain by private persons pursuant to State law as authorized by the Desert Land Act; (b) the right of the United States to use unappropriated water for the congressionally recognized and mandated purposes set forth in legislation providing for the management of the public domain; and (c) application by the United States to secure water rights pursuant to State law for these purposes.

Federal Land Policy and Management Act of 1976: Generally—Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Generally—Taylor Grazing Act: Generally—Water and Water Rights: Federal Appropriation

FLPMA, the Taylor Grazing Act, the O&C Act, and other statutes permit the United States to appropriate water for the diverse purposes found in the various statutes.

Federal Land Policy and Management Act of 1976: Generally—Water and Water Rights: Federal Appropriation

FLPMA authorizes the BLM to appropriate water for such uses as fish and wildlife maintenance and protection, scenic value preservation, and human consumption, and protection of areas of critical environmental concern.

National Park Service Areas: Water Rights—Water and Water Rights: Generally—Wildlife Refuges and Projects: Generally

The National Park Service and Fish and Wildlife Service may appropriate water to fulfill any congressionally authorized function for areas under their administration.

Solicitor's Opinion of July 20, 1937, M-28853, is overruled.

Solicitor's Opinions, State of New Mexico, 55 I.D. 466 (1936), and Lee J. Esplin, 56 I.D. 325 (1938), are overruled to the extent they apply to the 1926 Executive Order to artificially developed water sources on the public lands.

Solicitor's Opinion M-33969 (Nov. 7, 1950) is disavowed to the extent that it concludes that the United States owns the unappropriated water on the public domain.

Solicitor's Opinion M-33969 (Nov. 7, 1950) is overruled to the extent that it concludes that the mere exercise of dominion and control over the water on the public domain by the United States causes the water to be reserved for public use and withdrawn from private appropriation without further action.

**OPINION BY OFFICE OF
THE SOLICITOR**

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TO: SECRETARY
FROM: SOLICITOR
SUBJECT: FEDERAL WATER RIGHTS
OF THE NATIONAL PARK SERVICE,
FISH AND WILDLIFE SERVICE, BU-
REAU OF RECLAMATION AND THE
BUREAU OF LAND MANAGEMENT

1. INTRODUCTION

The opinion discusses the nature and extent of the United States' rights to use water on the federal lands administered by the National Park Service (NPS), Fish and Wildlife Service (FWS), Bureau of Reclamation (Reclamation), and the Bureau of Land Management (BLM) within the United States Department of the Interior. The President's Water Policy message (June 6, 1978) and subsequent

memorandum to you (July 12, 1978) directed the Department to expeditiously identify, establish and quantify its non-Indian federal reserved water rights. As a part of this effort, my office has undertaken a comprehensive analysis of the reserved water rights which may be asserted on the federal lands administered by NPS, FWS, Reclamation and BLM.¹ My staff has also analyzed other (non-reserved) federal water rights. This opinion summarizes my legal conclusions.

¹ None of the other bureaus or agencies within the Department of the Interior administer significant amounts, if any, of lands for which a reserved water right may be claimed. This opinion does not deal with reserved water rights which may be claimed on behalf of Indians.

11. NATURE OF FEDERAL-STATE RELATIONS IN DETERMINING WATER RIGHTS

The westward expansion of the United States resulted from cessions by various foreign nations, through which the United States obtained ownership of the lands now comprising the Western States and ownership of all rights appurtenant to the lands, except those interests in lands and appurtenant rights established under previous sovereigns. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 15-16 (1935); *Knight v. United States Land Ass'n.*, 142 U.S. 161, 183-184 (1891).

The plenary power that Congress has under the Property Clause² by virtue of federal ownership of these lands includes the power to control the disposition and use of water on, under, flowing through or appurtenant to such lands. *See United States v. Grand River Dam Authority*, 363 U.S. 229, 235 (1960) (Because the "Federal Government was the initial proprietor in these western lands * * * any claim by a state or by others must derive from this federal title."); *cf., Kleppe v. New Mexico*, 426 U.S. 529, 539-41

(1976). Congress may exercise its power to manage or dispose of all the lands and waters on the public lands, together or separately. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935); see also *United States v. California*, 332 U.S. 19, 27 (1947). No interest in the property of the United States may be acquired in the absence of an express grant from Congress; and, absent that grant or consent, it continues to be held by the United States. *United States v. Grand River Dam Authority*, *supra*; *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404-05 (1917). Such grants and disposals to the states are not lightly inferred; *i.e.*, "nothing passes but what is conveyed in clear and explicit language—inference being resolved not against but for the Government." *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919); see also *Andrus v. Charles-tone Stone Products Co.*, 436 U.S. 604, 617 (1978).

It follows that to the extent Congress has not clearly granted authority to the states over waters which are in, on, under or appurtenant to federal lands, the Federal Government maintains its sovereign rights in such waters and may put them to use irrespective of state law.³

² U.S. CONST. art. IV, § 3, cl. 2 provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

³ See, *e.g.*, Morreale, "Federal-State Rights and Relations," 2 *Waters and Water Rights*, 51-52, 81 (R. Clark ed. 1967).

The admission of a state into the Union and the "equal footing" doctrine did not divest the United States of its plenary control over such water. *Cappaert v. United States*, 426 U.S. 128, 144-45 (1976); *Arizona v. California*, 373 U.S. 546, 599 (1963). The Supreme Court has, however, recently noted the existence of one school of legal thought that this doctrine vested Western States, upon admission to the Union, with "exclusive sovereignty" over the unappropriated waters in their streams. *California v. United States*, 438 U.S. 645, 654 (1978). This school of thought is difficult to square with the reserved rights doctrine repeatedly affirmed by the Supreme Court as applying to reservations of land in a state after statehood. See, e.g., *United States v. New Mexico*, 438 U.S. 696, 698, 700, n. 4 (1978); *Cappaert v. United States*, *supra*; cf. *Winters v. United States*, 207 U.S. 564, 577 (1908).

Moreover, the states may not exercise any governmental authority over federal property unless they have been expressly granted that authority by the Congress, since Congress retains exclusive control over the acquisition of private rights in federal lands and interests. *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274 (1879); *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1872); *Irvine v. Marshall*, 61 U.S. (20 How.) 558, 563 (1858). Federal control over the disposition and use of water in, on, under or appurtenant to federal land ultimately rests upon the Supremacy

Clause⁴, which permits the Federal Government to exercise its constitutional prerogatives without regard to state law. *Cappaert v. United States*, *supra* at 145; *Arizona v. California*, 283 U.S. 423, 451 (1931); cf., *Kleppe v. New Mexico*, *supra*, at 543; *Ohio v. Thomas*, 173 U.S. 276, 283 (1899); *Johnson v. Maryland*, 254 U.S. 51 (1920).

Federal control over its needed water rights, unhampered by compliance with procedural and substantive state law, is supported by the Supremacy Clause and the doctrine that federal activities are immune from state regulation unless there is a "clear congressional mandate," *Kern-Limerick Inc. v. Secorlock*, 347 U.S. 110, 122 (1954); or "specific congressional action," *Paul v. United States*, 371 U.S. 245, 263 (1963), providing for state control. See also *Mayo v. United States*, 319 U.S. 441, 448 (1943); *Hancock v. Train*, 426 U.S. 167, 178-81 (1976); *EPA v. State Water Resources Control Board*, 426 U.S. 200, 214, 217, 221 (1976). Cf. *Arizona v. California*, *supra*, (Congressionally authorized dam and reservoir can proceed without submitting plans and specifications to State Engineer for approval). State legislative claims to all water found within state boundaries do not alter this premise, since Congress, under the Property Clause, has the exclusive power to dispose of federal property. *California Oregon Power Co. v. Beaver Portland Cement Co.*, *supra* at 162; *Utah Power & Light Co. v. United States*, *supra* at 404.

⁴ U.S. CONST. art. VI, cl. 2.

Originally, the common law riparian rules of natural flow applied to the public lands. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899). There the Court opined, in *dicta*, that these riparian rules could be changed by the state legislatures if, in the absence of specific Congressional consent, they did not destroy the right of the United States to the continued flow of water bordering its lands needed for the beneficial use of government property. The Court furthermore held that the states could not destroy or interfere with the paramount power of the United States to secure the navigability of navigable streams. *Ibid.*

In the arid Western States, the state legislatures adopted the appropriation doctrine, which grew out of local mining customs. The appropriation doctrine permits beneficial water uses under a priority system ("first in time is first in right") without regard to ownership of a watercourse's abutting lands or the impacts on downstream riparian landowners. With the settlement of the public lands, conflict arose over the water rights of federal patentees claiming riparian rights and prior appropriators whose rights were recognized under local laws and customs.

Beginning in 1866, Congress passed three statutes which resolved this conflict between private users in favor of prior appropriators. These three statutes still, more than one

hundred years later, provide the basis for state regulatory authority over water rights. The Acts of July 26, 1866, 14 Stat. 253, and July 9, 1870, 16 Stat. 218, 43 U.S.C. § 661 (1976), recognized and sanctioned possessory rights to water on the public lands asserted under local laws and customs, thereby validating, in effect, state appropriation water laws procedures for private users and previous trespassers on the public lands. *Federal Power Commission v. Oregon*, 349 U.S. 435, 447-8 (1955); *Broder v. Natoma Water & Mining Co.*, *supra* at 276; *Jennison v. Kirk*, 98 U.S. 453 (1878); for background on the 1866 Act, see *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 745-49 (1950).⁵ By these 1866 and 1870 Acts, Congress in effect waived its proprietary and riparian rights to water on the public domain to the extent that water is appropriated by members of the public under state law in conformance with the grant of authority found in these two Acts. Thus, these two Acts confirm assertion of inchoate federal water rights to unappropriated

⁵ The 1866 Act provided, in pertinent part: "[W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts; the possessors and owners of such vested rights shall be maintained and protected in the same; * * * [14 Stat. 253].

The 1870 Act provided that "all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights."

waters that exist at any point in time.

The third statute, the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 *et seq.* (1976), provides generally for the homesteading of the public domain in tracts larger than prior laws allowed, if the homesteader irrigated and reclaimed the land. The Supreme Court's treatment of the effect of the Desert Land Act on federal water rights has been unclear and conflicting, as developed below. The provision of the Act with which we are here concerned (43 U.S.C. § 321) was a *proviso* that the homesteader would have rights to use only that water "necessarily used for the purpose of irrigation and reclamation," and went on to state:

[A]ll the surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

The application of this part of the Act to federal water rights requires some discussion, for several limitations appear on its face. *First*, it applies only to non-navigable sources of water. *Second*, it applies only to such sources on the public lands. *Third*, it applies to "*surplus water over and above such actual appropriation and use.*" (*Italics added.*) *Fourth*, it makes the water available only for "irrigation, mining and manufacturing purposes." *Fifth*, it does not directly address

federal rights to use water for congressionally authorized purposes on the federal lands, but instead is aimed at appropriation and use by "the public." *Finally*, the Desert Land Act applies only to certain states, originally California, Oregon and Nevada, and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota (later to become the states of North and South Dakota). 43 U.S.C. § 323 (1976). Colorado was added later (26 Stat. 1097, Mar. 3, 1891).

Several things can be said about these limitations. *First*, the Supreme Court has been careful to repeat the Act's limitations to non-navigable waters in subsequent cases.⁶ Moreover, it has squarely held that the Act does not allow the right to appropriate non-navigable waters which are sources of navigable streams "to such an extent as to destroy their navigability, * * *."⁷

On the other hand, the two predecessor Acts of the Desert Land Act

⁶ See, e.g., *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690, 706 (1899); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935); *Jekes v. Fox*, 300 U.S. 82, 95 (1937); *Brush v. Commissioner*, 300 U.S. 352, 367 (1937); *Capaert v. United States*, 426 U.S. 128, 143, 145 (1976); *California v. United States*, 438 U.S. 645, 658 (1978).

⁷ *United States v. Rio Grande Irrigation Co.*, *supra*, 174 U.S. at 706. As passed by the Senate, the provision read: "and the water in all lakes, rivers, and other sources of water supply shall remain and be held for the use of the public for purposes of irrigation and mining." See Cong. Rec. (Feb. 27, 1877), p. 1973. The language was changed to apply only to non-navigable waters in Conference, without explanation. Cong. Rec. (Mar. 3, 1877), p. 2156.

both recognized and ratified a pre-existing right to possession of water in accordance with local custom, laws and court decisions, *see* 14 Stat. 251, 253 (1866); 16 Stat. 217, 218 (1870); *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274, 276 (1879), and neither statute was expressly limited to non-navigable waters.⁸ Moreover, the Supreme Court has held that these two Acts are not limited to rights acquired before 1866, but "reach into the future as well * * *."⁹ Therefore, the significance of the Desert Land Act's limitation to non-navigable waters is unclear.

Second, the Act's limitation to sources on the *public lands* received express recognition in *Federal Power Commission v. Oregon*, 349 U.S. at 448 (1955), which held the Act inapplicable to *reservations* of land from the public domain without distinguishing between whether the water involved was needed to carry out the purposes of the reservation, *see* part III A, *infra*, or was for congressionally authorized uses apart from the purposes of the reservation; *see* part III B.

Third, the Act's limitation to unused, unappropriated waters means that to the extent the Federal Government was using water in connec-

tion with federal land management in 1877, it was not free for "the appropriation and use of the public." But whether it prevented the Federal Government from using additional water after 1877 except in compliance with state law requires further scrutiny, provided below.

Fourth, the Act's limitation to water for "irrigation, mining and manufacturing purposes" has not been found by the Supreme Court to be particularly significant. In 1935 the Court, purporting to give this language its "natural meaning," held that it "effected a severance of *all* waters upon the public domain, not theretofore appropriated, from the land itself," apparently without limitation to the purposes for which the waters could be appropriated.¹⁰ No mention of the limitation to certain purposes was made in subsequent Supreme Court cases.

Fifth, the fact that the Desert Land Act does not deal with federal acquisition of water rights has had varying significance for the Supreme Court over the years. Initially, in *Rio Grande, supra*, the Court stated (albeit in *dictum* apart from its discussion later in the opinion of the Desert Land Act), that the United States' right, as the owner of lands bordering a stream, to the continued flow of such waters "as may be necessary for the beneficial uses of government property" cannot be destroyed by state legislation. 174 U.S. at 703. This limi-

⁸ Somewhat curiously, however, the Supreme Court in 1935 said these two statutes were the "test and measure of private rights in and to the non-navigable waters on public domain." *California Oregon Power Co., supra*, 295 U.S. at 155 (italics added).

⁹ *Ibid.*; *see also California v. United States, supra*, 438 U.S. at 656-57, n. 11.

¹⁰ *Id.*, 295 U.S. at 158 (italics added).

tation was repeated and endorsed in *Winters v. United States*, 207 U.S. 564, 577 (1908), and in *California Oregon Power Co.*, *supra*, 295 U.S. at 159. Later in the latter decision, however, the Court stated that the Desert Land Act vested the states with power "to affect the riparian rights of the *United States* [and] its grantees * * *." 295 U.S. at 162 (*italics added*); *see also* 295 U.S. at 164.¹¹

These statements concerning the rights of the United States were *dictum*, since the case itself con-

cerned rights of a patentee of public land, squarely covered by the Desert Land Act itself.

Twenty years later, in *Federal Power Commission v. Oregon*, *supra*, the Court said that the Desert Land Act "severed, for purposes of *private* acquisition, soil and water rights" on public lands. 349 U.S. at 448 (*italics added*), without expressly mentioning federal agencies' acquisition of water rights.

Twenty-one years after *FPC v. Oregon*, the Court again construed the Act as providing only that *patentees* of public land "must acquire water rights in non-navigable water in accordance with state law." *Cappaert v. United States*, *supra*, 426 U.S. at 143. The Court went on to state flatly: "Federal water rights are not dependent upon state law or state procedures * * *." 426 U.S. at 145. To the extent that the remark applies to federal non-reserved water rights, it is *dictum*, because the case itself concerned a federal reserved right.

Two years later, however, the Supreme Court, in construing the Reclamation Act, found occasion to observe in *dictum* that there are two limitations on the states' "exclusive control of its streams—reserved rights * * * and the navigation servitude." *California v. United States*, *supra*, 438 U.S. at 662. The Court cited only *United States v. Rio Grande Irrigation Co.*, *supra*, 174 U.S. at 703, for the proposition that only *reserved rights*, rather than all federal water rights needed to carry out congressionally man-

¹¹ Before it was revived to some extent by the decision in *California v. United States*, discussed *infra*, Dean Trelase, a noted authority on water law, commented that the decision in *California Oregon Power Co.* "now seems to be a spurious reading of the Desert Land Act." Trelase, "Federal Reserved Rights Since the PLLRC," 54 Denver L. J. 473, 476 (1977). Four years after *California Oregon Power*, the 9th Circuit cited the decision for the proposition that "*private* rights in the waters of non-navigable streams on the public domain are measured by local customs, laws and judicial decisions," but that the government may, "independently of the formalities of an actual appropriation, reserve the waters of non-navigable streams on the public domain if needed for governmental purposes." *United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 336-37 (9th Cir. 1939) (*italics added*). To the extent the Court's remarks extends to non-reserved federal water rights, it is *dictum*, since the case concerned an Indian reserved water right. *See also Nebraska v. Wyoming*, 325 U.S. 589, 611-16 (1945), where the Court declined to decide whether the United States owned the unappropriated water of the Platte River, because the water rights for reclamation projects on that River were obtained in accordance with state law pursuant to sec. 8 of the Reclamation Act, 43 U.S.C. § 383 (1976), and therefore the question of ownership by the United States "of unappropriated water is largely academic * * *." 325 U.S. at 616. *See also Cappaert v. United States*, *supra*, 426 U.S. at 144, fn. 9; and *Arizona v. California*, *supra*, where the Court declined to consider Arizona's "rights to interstate or local waters which have not yet been, and which may never be, appropriated." 283 U.S. at 464 (*citations omitted*).

dated land management responsibilities, fall within this exception allowed by the Desert Land Act. In the passage cited by the Court in *California v. United States*, the Court had stated, in *dictum*:

[I]n the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.¹²

It therefore seems plain that the *Rio Grande* Court, in construing the Desert Land Act twenty-two years after its passage, did not limit the exception to the higher reserved rights standard—the right to use waters on lands reserved from the federal domain for *specific* purposes, “where without the water the purposes of the reservation would be entirely defeated,”¹³—but instead allowed it under a lesser standard, for water necessary for the beneficial uses of the government property.

It is apparent that prior Supreme Court *dicta* are somewhat at war with one another on this issue. One reason for this is found in the Desert Land Act itself. That Act was one

of many statutes enacted in the latter half of the 19th and early part of the 20th centuries to promote settlement and cultivation of public domain lands. It spoke principally to the process by which arid public lands were to be irrigated and reclaimed and transferred from the public domain into private hands. See, e.g., *Williams v. United States*, 138 U.S. 514 (1891); *United States v. Healey*, 160 U.S. 136 (1895). Except to the extent the quoted language applies to the Federal Government, it addressed not at all the rights and obligations of the United States as owner of those federal lands not brought within the settlement scheme it established. Because of this, the legislative history does not contain any debate over the impact of the bill on federal water rights.

In any event, because the Supreme Court has spoken only by inconsistent *dictum* on this subject, the guidance I must give federal agencies must be based to a large degree on predicting how the Supreme Court may resolve these conflicting statements contained in prior decisions.

I am of the opinion that by these relatively narrow Acts of 1866, 1870 and 1877, the United States did not divest itself of its authority, as sovereign, to use the *unappropriated* waters on the public lands for governmental purposes. Supreme Court decisions upholding federal reserved water rights created after the effective dates of these statutes affirm

¹² At 174 U.S. 703 (1899). This passage has been repeated and endorsed several times by the Supreme Court. See, e.g., *Gutierrez v. Albuquerque Land Co.*, 188 U.S. 545, 554 (1903); *Kansas v. Olorado*, 206 U.S. 46, 86 (1907); *California Oregon Power Co.*, *supra*, 295 U.S. at 159.

¹³ *United States v. New Mexico*, 438 U.S. 696, 700 (1978), decided the same day and as a companion to *California v. United States*, *supra*.

this conclusion (*United States v. New Mexico, supra*, at 698):

The Court has previously concluded that whatever powers the States acquired over their waters as a result of congressional Acts and admission to the Union, however, Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes. *Winters v. United States*, 207 U.S. 564, 577 (1908); *Arizona v. California*, 373 U.S. 546, 579-98 (1963); *Cappaert v. United States*, 426 U.S. 128, 143-46 (1976).

Given the constitutional underpinning for, and the nature of, federal ownership and control of the public lands and their associated resources, it is not difficult to understand why Congress has on numerous occasions expressly provided that state law would govern the acquisition of rights to use waters on the public domain by private individuals. In a constitutional context, this so-called "express deference to state water law"¹⁴ is essential to divest the United States of its inherent power and control over its property and to give the states the opportunity and the power to regulate the use and acquisition of resources, including water, otherwise controlled by the United States.

In both *United States v. New Mexico, supra*, and *California v. United States*, 438 U.S. 645 (1978), the Supreme Court identified directives in various federal laws that state law should be followed or that

the federal law should not be construed to interfere with state law.¹⁵ Each of these laws deal with a specific federal project or program, or contained general standards pertaining to the acquisition or protection of *private* rights to the use of water on the public domain. I believe that neither the Desert Land Act nor any other federal statute deals generally with how the United States should acquire and maintain rights to use water on the public domain and reserved public domain.¹⁶

Congress has been fully aware of the continuing problem of state-federal relations in this area and even though attempts have been made,¹⁷ it has never acted to require compliance with state law in every instance where the United States acquires water rights. In fact, Con-

¹⁵ See *Ibid.*, fn. 5.

¹⁶ Of the 37 statutes referred to by the Court in *New Mexico, supra*, 438 U.S. at 702, n. 5, 33 contain general statements indicating that such legislation should not be construed to interfere with the right of states to control the use of water within their boundaries or that a private person or government official should comply with state law when carrying out a specific program or purpose such as constructing or planning a public works project, disposing of Indian lands, or conferring certain benefits on a state. The remaining statutes either do not mention state law or are not related to the acquisition of water rights.

¹⁷ See, e.g., S. 863, 84th Cong., 1st Sess. (1955); S. 1275, 88th Cong., 2d Sess. (1964); Morreale, "Federal-State Conflicts Over Western Waters—A Decade of 'Clarifying Legislation,'" 20 Rutgers L. Rev. 423 (1966); Corker, "Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957," 45 Calif. L. Rev. 604 (1957). A recent GAO Report summarizes some of the more important legislative proposals made over the past 25 years. See "Reserved Water Rights for Federal and Indian Reservations, A Growing Controversy in Need of Resolution" (GAO-CIRD-78-176, Nov. 16, 1978) pp. 39-50.

¹⁴ *United States v. New Mexico, supra*, 438 U.S. at 702 (1978).

gress has recognized that the United States could acquire rights to use water in ways other than through state law.¹⁸ Since Congress has not generally directed the Federal Government to comply with state water law, such compliance is required only in those specific instances where Congress has so provided. But while Congress has not directed the Federal Government to comply with state water law, neither has it prohibited the United States from voluntarily complying with such state water laws unless specifically directed.

In summary, since the Federal Government has never granted away its right to make use of unappropriated waters on federal lands, it is my opinion that the United States has retained its power to vest in itself water rights in *unappropriated* waters and it may exercise such power independent of substantive state law. See *United States v. Rio Grande Dam and Irrigation Co.*, *supra*; see also discussion at part III B below.

¹⁸ See 16 U.S.C. § 1284(c) (1976). One of the statutes on the list cited by the Supreme Court in *United States v. New Mexico*, *supra*, is the McCarran Amendment, 43 U.S.C. § 666 (1976). It is noteworthy that this provision—which waives the sovereign immunity of the United States in certain cases—refers to the acquisition of water rights by the United States “by appropriation under State law, by purchase, by exchange, or otherwise * * *” (italics supplied). The Supreme Court relied on the “or otherwise” language in holding the Amendment waived the United States’ sovereign immunity for all federal water rights, including “appropriative rights, riparian rights, and reserved rights.” *United States v. District Court for Eagle County*, 401 U.S. 520, 524 (1971).

III. RETENTION AND ACQUISITION OF WATER RIGHTS BY THE UNITED STATES

The United States retains water rights by reserving federal lands and waters necessary to fulfill specified purposes and obtains water rights by (1) appropriation of water and application to those uses authorized by Congress to carry out congressionally authorized programs on the public domain, reserved and acquired lands; and (2) acquisition of water rights through purchase, exchange or condemnation.

A. Reserved Rights Doctrine

The federal reserved water rights doctrine is a judicial creation¹⁹ which holds:

[T]hat when the Federal Government withdraws its lands from the public do-

¹⁹ Federal reserved water rights were first explicitly recognized in a case interpreting an agreement between the United States and an Indian tribe. *Winters v. United States*, 207 U.S. 564 (1908). In *Winters*, the Court relied in part on Congress inferred intent in the Fort Belknap Agreement to transform the Indians into a “pastoral and civilized people,” the need for irrigated water to make the reservation lands productive, and the construction rules resolving ambiguities in the favor of Indians, to find that the undeniable “power of the Government to reserve the waters and exempt them from appropriation under the state laws” had been exercised in this case. *Id.* at 576–577.

The concept of federal reserved water rights was first expressly extended to non-Indian federal reservations; *i.e.*, wildlife refuges, national recreation areas, national forests, in *Arizona v. California*, 373 U.S. 546 (1963), though the Court had intimated that the doctrine would be so extended several years previously. See *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955). In *Arizona v. California*, the Court expressly held that the

main and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In doing so the United States acquires a reserved water right in unappropriated water which vests on the date of the reservation and is superior to the rights, of future appropriators. Reservation of water is empowered by the Commerce Clause, Art. 1, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams.^[2]

Reserved water rights are most often created by implication rather than by express reservation. The intent to reserve water "is inferred if the previously unappropriated water is necessary to accomplish the purposes for which the land reservation is created," because the courts have reasoned that the Federal Government would not reserve lands for specific purposes unless it also intended to reserve unappropriated water necessary to fulfill those purposes. *Cappaert v. United States*, *supra* at 139; see *United States v. New Mexico*, *supra*, at 701-02. However, "[w]here water is only valuable for a secondary use of the reser-

vation * * * there arises the contrary inference that Congress intended * * * that the United States would acquire water in the same manner as any other public or private appropriator." *United States v. New Mexico*, *supra* at 702. Thus, there is an important distinction between the purposes of a land reservation and secondary or subsidiary management apart from the reservation purpose(s); i.e., only the former obtain water rights by the act of reserving the land for particular purposes. This distinction is further explored in part III B, *infra*.

The measure of the federal reserved water right is that quantity of water needed to accomplish the purposes of the reservation and no more. *Cappaert v. United States*, *supra*. The priority date of the federal reserved water right for purposes of determining seniority of water rights relative to those obtained under state or federal law is the date of the federal reservation or withdrawal action initiated toward a reservation. A reserved water right may be created by an Act of Congress (*United States v. New Mexico*, *supra*), a Presidential Proclamation (*Cappaert v. United States*, *supra*), an executive order (*Arizona v. California*, *supra*), a treaty (*Winters v. United States*, *supra*), a Secretarial land order (*Arizona v. California*, *supra*), or other departmental action ultimately creating a reservation (*United States v. Walker River*

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"principle underlying the reservation of water rights * * * was equally applicable to other federal establishments." *Id.* at 601. Subsequently, numerous cases have applied the reserved water rights doctrine to withdrawals and reservations under the jurisdiction of NPS, FWS and BLM. See, for example *Cappaert v. United States*, *supra*; *In the Matter of the United States of America, Water Division's 4, 5 and 6*, Civil Nos. W-425 etc. (Colo. D.C., Mar. 6, 1978), appeal pending (Nos. 78-SA99 and 100, Colo. Sup. Ct.).

²⁰ *Cappaert v. United States*, *supra*, at 138.

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Irrigation Dist., 104 F.2d 334 (9th Cir. 1939)).

State law requirements such as notice of application to beneficial use are not required to perfect reserved water rights. *Cappaert v. United States*, *supra*, at 143, 145. The "volume and scope of particular reserved rights, are federal questions" calling for the application of federal law (*e.g.*, the fact that state water law systems may not provide for minimum instream flows is irrelevant if such flows are needed to carry out the purposes of the reservation), though state courts are competent to initially determine federal reserved water rights in McCarran Amendment (43 U.S.C. § 666 (1976)) proceedings. *United States v. District Court for Eagle County*, 401 U.S. 520, 526 (1971). Finally, reserved water rights encompass both existing uses and future water requirements necessary to fulfill the purposes of the reservation. *See Arizona v. California*, 373 U.S., *supra*, at 600-601.

In sum, the federal reserved water right is created by implication as well as by express language in the reservation of public land for particular purposes. It arises from federal law and is not dependent on state law for its existence or perfection. It does not require that water be put to actual use, and therefore is different from the concept of appropriation of water upon which Western States principally, but not

exclusively,²¹ rely. It establishes a right to water to carry out the purpose(s) of the federal reservation as of the date the reservation is created, whether the water is actually put to use and whether future appropriators under state law have actual knowledge of its existence. Certain other contours of the reserved water rights doctrine "remain unspecified" and guiding the Department's approach to some of these must await concrete fact situations, in the absence of precedent to guide reasonable assertion of reserved water rights. *See United States v. New Mexico*, *supra*, at 700.²² This reserved right doctrine

²¹ Same Western States recognize the existence of riparian rights, which may not depend upon actual use, and can create uncertainty with respect to other, "vested" state water rights based on actual appropriation and use so long as they are unadjudicated, in the same manner as unquantified federal reserved rights. *See, e.g., In Re Waters of Long Valley Creek System*, 84 Cal. App. 3d 140 (Cal. Ct. App. 1978), appeal pending, Cal. Sup. Ct.; *see also United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-55 (1950).

²² As an example, this opinion does not discuss whether the reserved water rights doctrine applies to acquired lands. While I am of the opinion that persuasive arguments may be made both for or against the assertion of reserved rights on acquired lands of the United States, I do not find it necessary to resolve this issue in this opinion because it is the policy of the Department to acquire water rights on acquired lands through methods other than assertion of a reserved water right. Compare C. Wheatley, "Study of the Development, Management, and Use of Water Resources on the Public Lands," 83 (1969); Corker, "Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957," 45 Calif. L. Rev. 604, 612 (1957); Tarlock and Tippy, "The Wild and Scenic Rivers Act of 1968," 55 Cornell L. Rev. 707, 735-36. (1970); with *Federal Reserved Water Rights Task Group Report* (prepared for

is applied to the various types of federal reservations administered by the Department in secs. IV-VIII of this opinion.

B. Federal Water Rights Obtained Through Appropriation and Use For Congressionally Authorized Purposes

The land management agencies of the Department of the Interior have, throughout their history, appropriated water on the lands they administer to carry out congressionally authorized or mandated programs. This appropriation of water—its actual application to a federal use—is necessary to carry out the secondary uses for which many federal reservations are administered. It is also essential for the management and administration of non-reserved federal lands. No opinion on the water rights of the land management agencies of this Department would be complete without the discussion that follows on the non-reserved water rights of this Department.

Even though federal reserved rights have received the greatest judicial and political attention, the United States also has the right to appropriate water on its own property for congressionally authorized uses, whether or not such uses are part of any "reservation" of the land.

This right to use water for con-

gressionally sanctioned purposes is not a "reserved" right. That is, it does not arise by implication from the reservation of land for particular purposes, but instead arises from actual use of unappropriated water by the **United States** to carry out congressionally authorized management objectives on federal lands. Unlike the reserved right, this federal right to appropriate water (like all state-recognized appropriative rights) may not pre-date, in priority, the date action is taken leading to an actual use, whether consumptive or non-consumptive, and it may not adversely affect other rights established under state law. The time of its actual initiation and the purpose and quantity of the use establish limitations on the extent of the right.

The existence of the right is supported by case law and a previous Solicitor's opinion. See discussion and cases cited at part II, *supra*, and *United States v. District Court for Eagle County, supra*, at 524; *State of Nevada ex rel. Shamberger v. United States*, 165 F. Supp. 600 (D. Nev. 1958) (*dictum*); *aff'd on other grounds*, 279 F. 2d 699 (9th Cir. 1960); *Solicitor's Opinion*, M-33969, "Compliance by the Department with State Laws Concerning Water Rights," pp. 6-7 (Nov. 7, 1950); *cf. United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973). It is also unanimously recognized by commentators and others; *e.g.*, in the words of the National Water Commission: "Federal agencies may also have made some water uses that neither comply with

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Water Resources Policy Study, Nov. 7, 1977), 7-8. A corollary issue not discussed is the application of the reserved water rights doctrine in non-public domain states.

State law nor can be justified under the reservation doctrine. The power of Federal agencies to make such uses cannot be denied under the Supremacy Clause, if the water has been taken through the exercise of constitutional power." And further: "The reservation doctrine is a financial doctrine only; it confers no power on the Federal Government that it does not otherwise enjoy. Anytime the United States needs water * * * to carry out a program authorized by the Constitution, it has ample power to acquire it." National Water Commission, *Water Policies for the Future*, at pp. 466, 467 (1973); see also F. Trelease, *Federal-State Relations in Water Law* 147; (Legal Study No. 5, prepared for National Water Commission, Sept. 7, 1971); C. Wheatley, *Study of the Development, the Management, and Use of Water Resources on the Public Lands*, 78-80, 112-116 (1969).

Although such rights are in the foregoing respects exactly congruent with ordinary state appropriation law, the appropriation for authorized federal purposes cannot be strictly limited by what state water law says is a "diversion" of water or a "beneficial use" for which water can be appropriated.

Only Congress, as I stated earlier, has the authority under the Property Clause to control the disposition and use of water appurtenant to lands owned by the United States. See *Kleppe v. New Mexico*, *supra*;

cf. United States v. Little Lake Misere Land Co., 412 U.S. 580, 593-97 (1973) (this case held that federal courts may fashion rules of federal law necessary to carry out important congressionally authorized programs; *i.e.*, land acquisitions under the Migratory Bird Conservation Act; where state laws do not provide appropriate standards or unduly interfere with federal programs); *United States v. Albrecht*, 496 F.2d 906, 909-11 (8th Cir. 1974) (state law's failure to recognize property interest in an easement taken by the Federal Government to carry out the Migratory Bird Hunting Stamp Act does not prevent enforcement of easement, to carry out congressionally authorized national program). It is my opinion that, since Congress has vested only the public with the right to appropriate unappropriated water arising on, under, through or appurtenant to federally owned lands under state law, the United States itself retains a proprietary interest in those waters that have not been appropriated pursuant to state law. The United States therefore retains the power to utilize those unappropriated waters to carry out the management objectives specified in congressional directives. Such directives are authorized under the broad powers contained in the Property Clause. See *Kleppe v. New Mexico*, *supra*.

Any legislation enacted by Congress to accomplish management ob-

jectives on federal lands preempts conflicting state regulations or laws as a result of the operation of the Property and Supremacy Clauses of the United States Constitution. See *Kleppe v. New Mexico*, *supra*. Any authority the states may have been given to regulate and administer federal property and/or programs by the Congress may only be exercised in a manner which is "not inconsistent with clear congressional directives." See *California v. United States*, *supra*, 438 U.S. 645 at 672.

It seems plain, however, that most of the United States' appropriative (or non-reserved) water rights are recognized under the water law of most of the Western States, and therefore no conflict with state systems should generally exist. There may, of course, be conflicts between the Federal Government and provisions of state substantive law when federal agencies appropriate water for uses which are not recognized as "beneficial" under individual state water law systems, or where in-stream flows needed for federal purposes are not recognized as a "diversion" or "appropriation" of water under state law.

The question remains, however, whether and to what extent the United States must conform its assertion of non-reserved federal water rights to state law. The majority opinion in *United States v. New Mexico*, *supra*, suggests at one point that, if a reserved right does not exist, "there arises the contrary inference that Congress intended" federal agencies to "acquire water

in the same manner as any other public or private appropriator." 438 U.S. at 702. It is not clear whether the Court was referring generally to the concept of appropriation of water used by the Western States, or full compliance with procedural and substantive state water law, or only compliance with state procedures. If the Court intended by this *dictum* that the United States could only assert water rights for purposes recognized as beneficial under state law, then the federal land manager would have to manage the same kind of federal lands significantly differently in different states, depending on local law. The BLM, for example, may not be able to manage lands for recreation and fishery protection in one state to the same extent that it could in a neighboring state because of differences in what are regarded as "beneficial uses" under each state's law.

The majority in *New Mexico* does not discuss whether Congress intended this anomalous result. As noted above, the Court had two years previously stated in *Cappaert v. United States*, *supra*, at 145, that "[f]ederal water rights are not dependent upon state law or state procedures * * *." I must interpret the *dictum* in *United States v. New Mexico* in light of, and consistent with, prior Supreme Court pronouncements, especially since the Court did not purport to limit or overrule statements in prior decisions. Therefore, it is reasonable to conclude that although the majority

in *New Mexico* believed that non-reserved federal water rights must be acquired through some form of appropriation and actual use, I cannot subscribe to the view that these non-reserved federal water rights, used in connection with congressionally authorized land management programs, are dependent upon state law in defining their substantive contours. In my view, such a result would not comport comfortable with such Supreme Court decisions as *United States v. Little Lake Misere Land Co.*, *supra.*, recognizing the authority of the Federal Government to rely on federal law where state law interferes with congressionally authorized programs, and *Paul v. United States*, *supra.*, requiring an express action by Congress to delegate federal prerogatives to state authorities; and would contradict the unanimous view of the authorities cited above that the Federal Government's right to appropriate unappropriated water necessary to carry out congressionally mandated management functions cannot be defeated by state law definitions of beneficial use or diversion.

While I am firm in my opinion that federal non-reserved water rights are not dependent upon the substantive contours of state water law, the issue whether they must be perfected under state procedures is a closer question; *e.g.*, while congressionally authorized programs may plainly be frustrated in certain

states if the substance of state law is binding on federal agencies, *cf.*, *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), no equal danger is posed by compliance with state procedures.

Complying with state procedural law has certain advantages. It puts subsequent state appropriators on clear notice of federal rights, reduces uncertainty, and allows better integration of state and federal water rights. It is also literally consistent with one interpretation of the *dictum* in *United States v. New Mexico*, *supra.*; *i.e.*, the United States would acquire water in the same way—by the same procedures—as any appropriator.

While predicting the outcome if and when this issue reaches the Supreme Court is difficult, given the conflicting indications over the last hundred years of decisions construing the 1866, 1870 and 1877 Acts, I am of the opinion that the better policy is to follow state law in acquiring federal water rights to the greatest practicable extent. This includes following state procedural law in all cases involving appropriation of non-reserved water rights and state substantive law where that law recognizes the federal appropriative rights in all pertinent respects.

I am unable to say that such compliance is required as a matter of law, but because it may be required, the safer course is to follow state procedures in perfecting non-

reserved water rights. Although I have determined that Interior agencies should comply with state law to the greatest practicable extent, this should not be construed as a waiver of any rights to the use of water which agencies of this Department have established in the past, even if the use relates to other than a reserved right and is of a type which agencies should make application for through state procedures in the future. Interior agencies should, however, attempt promptly to record these existing uses with the states.

Therefore, application should be made pursuant to state procedural law for all uses of water Interior land management agencies are making and plan to make on the federal lands they manage which are not covered by reserved rights, as discussed more specifically in parts IV-IX below.

C. Other Methods for Acquiring Water Rights

The United States has available other methods by which it can acquire water rights for use on federal lands. Chief among these well-recognized methods are purchase, donation, exchange or condemnation. Congress, pursuant to its power to provide for the management of federal lands under the Property Clause and its authority to appropriate funds for carrying out the mandated land management objectives, can appropriate funds for the use of the land management agencies to purchase water rights

needed to carry out Congress directives.²³ Water rights are sometimes purchased, along with the land, when establishing such areas as fish and wildlife preserves. The United States also has the authority to exchange parcels of land or other property interests with non-federal parties or accept donations of land and interests therein. This includes the right to exchange lands carrying water rights or the water rights themselves.²⁴

Finally, the United States, as an incident of sovereignty, may condemn lands or interests therein when necessary to carry out federal programs. *Kohl v. United States*, 91 U.S. 367 (1875). This power of condemnation includes the condemnation of water rights. *Dugan v. Rank*, 372 U.S. 609 (1963).

IV. RESERVED WATER RIGHTS APPLICABLE TO AREAS ADMINISTERED BY BLM

This section discusses the reserved water rights doctrine as applied to BLM lands. The most important reservations administered by the BLM which have judicially recognized reserved water rights are public springs and water holes reserved under 43 U.S.C. §§ 141, 300 (1970) and 30 U.S.C. § 229a (1976).²⁵

²³ See, e.g., 16 U.S.C. §§ 17j-2, 715a 718d, 1277 (1976).

²⁴ See, e.g., 16 U.S.C. § 1277 (1976).

²⁵ In the matter of the Application of Water Rights of the United States of America, Colo. Water Divs. 4, 5, 6, p. 38, et seq., Opinion of Judge Stewart (Mar. 15, 1978), appeal pending (Nos. 79-SA99 and 100, Colo. Sup. Ct.).

A. Public Water Holes and Springs

I. Statutory Background and Legislative History

In the Act of Dec. 29, 1916,²⁶ Congress directly addressed the reservation of public springs and water holes and specifically included them as available for reservation under the broad authority previously granted the President in the Pickett Act.²⁷ Sec. 10 of the 1916 Act, formerly 43 U.S.C. § 300 (1970), provided, in pertinent part (*italics added*):

Lands containing waterholes or other bodies of water *needed or used by the public for watering purposes* shall not be designated under sections 291 to 301 of this title but *may be reserved under the provisions of sections 141 to 143 of this title* [the Pickett Act] and such lands, prior to December 29, 1916, or thereafter reserved shall, while so reserved, be kept and held open to the public use

²⁶ 43 U.S.C. § 291 *et seq.* (1976).

²⁷ 43 U.S.C. § 141 (1970), commonly referred to as the Pickett Act, was enacted on June 25, 1910, and provided:

"The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or *other public purposes to be specified in the orders of withdrawals*, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." [*Italics added.*]

Pursuant to the authority granted by this section, certain public water reserves were created; e.g., Public Water Reserve No. 19, issued by President Wilson on May 4, 1916. The Pickett Act was repealed by sec. 704(a) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 Note; however, existing withdrawals remain in force until changed in accordance with the Act. § 701(c); *ibid.*

for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe * * *.

The Pickett Act authorized the President to withdraw lands for "other public purposes" and the 1916 Act stated that reservations may be created when "needed or used by the public for watering purposes" or "for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe." The purposes for which the public may use the water on these reserved water holes or other bodies of water under secs. 141 and 300 must therefore be determined by interpretation of these sections, their legislative history, Executive Orders making the withdrawals, and the regulations of the Department of the Interior relating to these reservations.

Sec. 10 of the 1916 Act was part of the congressional plan to implement a system of stock raising homesteads in the western United States. It provided the Secretary of the Interior with authority to designate certain areas in the West for stock raising homesteads of 640 acres.²⁸

The purpose of Sec. 10 was described by the House Committee on Public Lands as follows:

This is a new section and authorizes the Secretary of the Interior to withdraw from entry and hold open for the general use of the public, important water holes, springs, and other bodies of water that are necessary for large surrounding

²⁸ 43 U.S.C. § 300 (1970).

tracts of country, so that a person cannot monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.^[29]

2. *The 1926 Withdrawal*

Most of the reserved springs and water holes were created by the Public Water Reserve No. 107, Executive Order of Apr. 17, 1926.³⁰ That general withdrawal of public lands states:

[E]very smallest legal subdivision of the public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or waterhole and all lands within one quarter of a mile of every spring or waterhole, located on unsurveyed public land, be, and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of Dec. 20, 1916 (39 Stat. 862), and in aid of pending litigation.

Following the issuance of Public Water Reserve No. 107, Executive Order of Apr. 17, 1926, the Department of the Interior adopted regulations pursuant to the direction in sec. 10 that water holes are to be reserved " * * * for such purposes under such general rules as the Secretary of the Interior may prescribe

* * *." Those regulations provide in pertinent part that:

The Executive Order of April 17, 1926, was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. It is not therefore to be construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals. It withdraws those springs and water holes capable of providing enough water for general use for watering purposes.^[31]

This blanket withdrawal had the effect of reserving not only the *land*, but also the *water* for public use, see *Jack A. Medd*, 60 I.D. 83 at 99 (1947); however, no specific purposes were set forth in this general withdrawal. The 1926 withdrawal was made in response to the fact that, prior to that time, effective control over vast areas of the public domain could be, and in some cases was, gained merely by securing patents to small tracts surrounding available water sources of a given area. By controlling access to the

²⁹ H.R. Rep. No. 35, Jan. 11, 1916, 64th Cong. 1st Sess.

³⁰ Numerous other specific withdrawals were made both prior and subsequent to the 1926 withdrawal, pursuant to the authority granted in the 1910 and 1916 Acts. See, e.g., Public Water Reserve No. 19, Colo. No. 1, May 14, 1914; Public Water Reserve No. 60, Colo. No. 2, Feb. 25, 1919; Exec. Order 5389 (July 7, 1930). These reserves are generally local in character or otherwise minor, and are not dealt with individually in this opinion. The general approach adopted here in relation to the 1926 Order is, of course, applicable to these reservations.

³¹ See 43 CFR 2311.0-3(a) (2). The original regulations issued with respect to the Apr. 17, 1926 Executive Order were contained in Instructions issued by the Commissioner of the General Land Office as Circular No. 1066, May 25, 1926, 51 I.D. 457. The first paragraph of the Instructions was substantially the same as the language quoted above. The remaining part of the Instructions required affidavits to be filed with every selection, filing or entry stating that no such spring or water hole existed within the boundaries of the land applied for or within one-quarter mile of the external boundaries of the tract. Even though 43 U.S.C. §§ 141 and 300 were repealed by FLPMA, § 701(c) of that Act provides that all existing withdrawals on the date of enactment shall remain in force until changed in accordance with the Act.

available water, a person could effectively retain exclusive use of great expanses of public lands. Stated another way, the water is often the key to the use of the land and land is the key to gaining access to the water.

The 1926 reservation was designed to prevent this private monopolization of water on the public domain. The means used was the traditional and most effective way of preserving resources on the public domain, *i.e.*, restricting entry by withdrawing the land and thus maintaining the water thereon open and free for public use. After the withdrawal, therefore, a party desiring to use the water either on or off the reservation would be required to obtain permission to do so from the United States through some form of permit. The permitting process allowed the United States to determine that the proposed use was in the public interest and not in derogation of the purposes of the reservation.

3. Purposes of the 1926 Withdrawal

The 1916 Act referred to water holes "needed or used by the public for watering purposes," and authorized the reservation "for such purposes * * * as the Secretary of the Interior may prescribe." The 1926 Order reserved the water holes "for public use." It is obvious that the purposes for which the public water holes and springs were withdrawn

include stock watering and human consumption.³²

We must, however, examine whether other purposes were also contemplated by the withdrawals. Such other purposes arguably might include, among other things, wildlife watering; range improvement, protection and management; agricultural irrigation; and watershed protection.

The language and legislative history of the public springs and water hole withdrawals, as well as the Department regulations, compel a conclusion that the purposes for which public springs and water holes were withdrawn were relatively narrow and specific. Water was, however, needed for purposes other than stockwatering and human consumption on the public lands that were intended to be homesteaded and patented pursuant to sec. 10 of the 1916 Act. Water was also needed for additional purposes on the unpatented public domain surrounding these soon-to-be-private lands that would be used by the influx of new settlers and homesteaders for livestock grazing and other uses.

I am therefore of the opinion that those other purposes include only (1) water for growing crops and sustaining fish and wildlife to allow the settlers on the public land to obtain food for their families and provide forage for their livestock; and (2) water for flood, soil, fire and

³² Colo. 4, 5, 6, *supra* at 40.

erosion control, the control of which was essential to protect the public and to allow the new patentees and settlers on the public domain to make a viable living in this arid and semi-arid region of the Nation where, for example, an uncontrolled prairie fire could completely destroy a home, life, belonging, livestock and forage.³³

There are two additional questions closely related to the purposes of the withdrawal. These are: (1) What quantity of water was withdrawn at each location by the 1926 Executive Order? and (2) Where may the waters so withdrawn be put to use for the stated purposes?

On the first question, it is clear that the 1926 Order was directed not so much at reserving 160-acre parcels of land as it was at preventing private acquisition of these scarce water resources.³⁴ It is therefore my opinion that the quantity of water reserved at each public water hole or spring is the total yield of each source. To claim less than that quantity would allow private rights to interfere with the public uses in derogation of the clear intent of the withdrawal. This is not to say, however, that the BLM may not make such reserved water available to private users of the public land under permits or

licenses; rather it means only that the BLM must decide whether and the extent of which such private use is compatible with the purposes of the withdrawal, and federal land management policies generally.

On the second question, there is no indication that the purposes for which the water was reserved were to be exclusively accomplished within the confines of the relatively small tracts of land withdrawn. Such a conclusion is, in fact, absurd in view of the thousands of acres of public lands which then and even now surround these public water sources and of the surrounding private lands that were homesteaded and patented under the 1916 Act, the full use of which were and still may be dependent upon the water reserved by this order. The withdrawal order cannot be reasonably interpreted to prevent the use of these reserved waters on nearby public or private lands beyond the area of land reserved. Considering that the purpose of the withdrawal was to fulfill a great public need in providing water for human consumption, livestock watering, and other purposes noted above, these uses may, in my opinion, be made of the water other than simply on the withdrawn lands.³⁵

4. *Types of Springs and Water Holes Subject to the 1926 Withdrawal*

a. Small Springs and Water Holes

³³ These purposes are somewhat broader than those contained in the Master Referee's Findings in *Colo. 4, 5, 6* which were confirmed by Judge Stewart. *Partial Master Referee Report Covering All of the Claims of the United States of America, Water Divs. 4, 5, 6, Colo., 38-42*, but I believe are justified given the history and manifest purposes of the 1926 Order.

³⁴ See discussion, *supra*, part IV. A.2.

³⁵ This opinion does not deal with the authority by which private persons may obtain authority to transport water off the withdrawn lands.

The 1926 Executive Order was a blanket withdrawal of "every" parcel of public domain land containing "a spring or waterhole." No distinction was made on the face of the Executive Order as to the quantity of water in the water source to be reserved. The legislative history of the acts authorizing the withdrawal, the events leading up to, and reasons expressed for, the 1926 withdrawal, and the regulations promulgated by the Department following the Executive Order of Apr. 17, 1926³⁶ are clear, however, that "lands having small springs or water holes affording only enough water for the use of one family and its domestic animals,"³⁶ were to be excluded from the withdrawal. The Executive Order must be construed in light of, and is limited by, the congressional grant of withdrawal power in 43 U.S.C. § 300 (1970). That Act and legislative history are consistent with the regulations.³⁷ In my opinion, only important springs and water holes providing enough water for general watering purposes beyond the needs of providing food and forage for just one family and its domestic animals were withdrawn by the 1926 Executive Order.

b. Artificially Developed Springs and Water Holes

Prior Interior decisions have reached somewhat differing conclusions on the applicability of the 1926 withdrawal to artificially developed water holes. The first of these decisions, *Santa Fe Pacific Railroad Co.*,³⁸ held that:

It is not believed that said order contemplated the withdrawal of tracts containing mere dry depressions or draws which do not, in their natural condition, furnish or retain a supply of water available for public use. Such a tract is not land which "contains a spring or water hole" in its natural condition, and it was not intended to withhold such land from acquisition by a person who has, by his own efforts, provided artificial means for collecting flood waters thereon.^[39]

A Solicitor's Opinion rendered six year later, however, held that the 1926 Order was applicable to an artificially developed water source. *State of New Mexico*⁴⁰ held that:

The springs or water holes withdrawn are, as the regulations state, "springs and water holes capable of providing enough water for general use for watering purposes." A water hole may be created by a flow from a well as from a spring or natural seep, and the fact that it was developed or brought into being by human agency, if rights thereto do not exist under the laws of the State, would not take it out of the letter or the spirit of the order.

* * * * *

³⁶ 43 CFR 2311.0-3(a)(2). Original Circular No. 1066, May 25, 1926.

³⁷ See, e.g., H.R. Rep. No. 35, *supra*, F.N. 29, referring to "important water holes, springs and other bodies of water * * * necessary for large surrounding tracts of country * * *."

³⁸ 53 I.D. 210 (1930).

³⁹ *Id.* at p. 211.

⁴⁰ 55 I.D. 466 (1936).

[The 1926 Order is] a continuing withdrawal and attaches to any lands that were at the time of its issuance or subsequently become of the character and status defined in the order.⁴¹

Two years later, in *Lee J. Esplin*,⁴² the Solicitor held that if the man-made water hole had been abandoned at the time of the 1926 Order, then it was withdrawn thereby. On the other hand, if the water hole had not been abandoned by the original developer or his successors in interest, then the Executive Order would have never attached.⁴³ In short, the decision holds that the 1926 Order does not apply to man-made or artificial structures upon the public domain unless they are abandoned by the original developer or his successor in interest.

That same year, in *A. T. West and Sons*, the Solicitor held, citing *Santa Fe Pacific Railroad, supra*,

⁴¹ *Id.* at p. 467, 468. See discussion, *Infra* at part IV B.1., of the Act of June 16, 1934, 48 Stat. 977, 30 U.S.C. § 229a (1976); concerning water producing oil and gas wells. Even though *State of New Mexico* dealt with such a well, it does not appear that the requirements of that Act were met in that case. Therefore, the decision rested solely on the effect of the 1926 Order, and the Solicitor did not rely on, or even cite, the 1934 Act in reaching his conclusion.

⁴² 56 I.D. 325 (1938); see also M-36625 dated Aug. 28, 1961.

⁴³ The 1938 opinion interpreted Executive Order 5389 dated July 7, 1930, which withdrew all hot springs or springs with curative properties existing on vacant, unappropriated, unreserved public lands. The order authorized the lease of those springs for public purposes under the Act of Mar. 3, 1925 (43 Stat. 1133). The Solicitor held that the Executive Order was a continual withdrawal attaching to lands which became of that character after the date of the order. It was also held that the order applied to such water sources developed by other than natural forces, such as drilled wells, although all such withdrawals were held subject to prior rights established under state law.

that, because the water hole was not natural and had been developed and continuously used by West since 1887, it was not of the character withdrawn by the 1926 Order.⁴⁴

The above decisions are the only ones found which relate to the prospective effect of the 1926 Order and its application to artificially developed water sources. I agree with the general conclusions reached in the earlier decision of this Department that the 1926 Order does not apply to man-made or artificial structures on the public domain if the developer holds a valid, vested water right to such source under state law at the time of development.

I cannot agree, however, with the inference in some of the opinions of my predecessors that the 1926 Order causes a reservation of all artificially developed water sources upon their abandonment.⁴⁵ The intent of the 1926 Executive Order was, as I earlier stated at part IV. A. 2. *supra*, to reserve naturally occurring water sources on the public domain in order to prevent monopolization of large tracts of surrounding land by one or a few individuals. It was not intended to reserve lands containing artificial sources such as a metal stock tank.

⁴⁴ 56 I.D. 387 (1938). The decision did state that once such a source was abandoned by the original developer anytime after 1926, then the withdrawal order would automatically attach, converting the once private source into a public water reserve. (The Solicitor cited the unreported decision of *Charles Lewis*, July 29, 1935, for this proposition.)

⁴⁵ I am therefore overruling expressions in prior opinions, such as *State of New Mexico*, 55 I.D. 466 (1936) and *Lee J. Esplin*, 56 I.D. 325 (1938) to the extent they apply the 1926 Order to artificially developed water sources on the public lands.

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When, however, the artificial (or man-made) structures are abandoned or forfeited by non-use, the United States as the owner of the real property succeeds to the ownership of the structures (as in the case of all fixtures) and may put the water from the developed source to beneficial use on the public domain.

c. Springs and Water Holes Which are Tributaries of Streams

In its unreported decision in *Hyrup v. Kleppe*,⁴⁶ the 10th Circuit Court of Appeals appeared to restrict the effect of the 1926 withdrawal, citing a 1927 Solicitor's Opinion for support,⁴⁷ by holding that the 1926 withdrawal did not apply to a spring if its flow rose to the dignity of a running stream and was tributary to a natural water

course. The *Hyrup* court did not define the term "tributary" in the opinion. In fact, there is no indication that the court considered placing any meaning on the term other than its common usage. This could be an important issue when viewed against a backdrop of state laws which attach significantly different meanings to the term, particularly in the context of defining which waters are subject to appropriation under state law.⁴⁸

Whether the waters of a particular spring or water hole are reserved is in each instance, however, a federal question calling for the application of federal law, *U.S. v. District Court of Eagle County*, *supra* at 526, and not dependent on state law or procedure. *Cappaert v. U.S.*, *supra* at 145. It is thus clear that *Hyrup* does not, and could not under the holdings of the Supreme Court, stand for the proposition that the United States is subject to varying state definitions of such terms as "tributary," "spring," and "water hole," that in turn are always subject to change by state legislatures.

⁴⁶ Nos. 76-1452 and 76-1767 (10th Cir., Nov. 7, 1977).

⁴⁷ Opinion of the Solicitor dated Mar. 8, 1927. The Solicitor's Opinion referred to in the opinion of the 10th Circuit did not, contrary to the court's assertion (slip op. pp. 10-11), conclude that the Executive Order applied only to springs and water holes which are not tributary to a stream. The opinion did not even address that issue; rather, it merely stated that the withdrawal could not be used as authority to reserve two tracts bordering on the Henrys Fork River in Wyoming for purposes of stock watering. The Henrys Fork is a perennial stream tributary to the Green River. It does not arise upon, but only flows through, BLM land. The Solicitor concluded that the 1926 Order did not effect withdrawals of lands bordering perennial rivers since they clearly did not fit the definition of a "spring" or "water hole." The opinion went on to conclude, however, that the withdrawal did apply to a water hole in the bed of an intermittent stream.

⁴⁸ In Colorado, for example, there is a presumption that all water is tributary to a natural watercourse and thus subject to appropriation. See *Safranelo v. Limon*, 123 Colo. 330, 228 P.2d 975 (1951); *Cline v. Whitten*, 150 Colo. 179, 372 P.2d 145 (1962), holding a spring to be part of the stream. See Colo. Rev. Stat. 1973 § 37-92-101 *et seq.*, and *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), *cert. den.* 421 U.S. 996 (1975), where the court found that groundwater which would take 178 years to reach a stream was not tributary.

I believe that Congress, in authorizing the Executive withdrawals in the 1910 and 1916 Acts, intended to confer broad authority to preserve for public use the sources of water on the public domain which were necessary for the proper development and use of the lands. The Executive withdrawals of 1926, and those which preceded it, were intended to prevent the recurrence of past abuses on the public domain and affected *all* water holes and springs as commonly defined. These water sources, as of the date of the withdrawals, were no longer subject to private appropriation under state law. I am also of the opinion that abandonment of a spring or water hole as defined herein by an individual who had a vested water right to that source pursuant to state law causes the 1926 Executive Order to attach at the time of abandonment. Whether a given source is or has been affected by the withdrawal is a matter of federal law. *See, e.g., Cappaert v. United States*, 426 U.S. 128, 143-46 (1976). I am therefore of the opinion that actions by a state legislature in defining classes of water cannot alter the effect of the federal action.

5. *Effect of 1926 Withdrawal on Water Rights Established Under State Law*

Previous decisions of this Department, with which I fully concur, have uniformly held that the 1926 Order (like all reservations creating reserved rights) cannot interfere with a water right vested under

state law prior to the 1926 withdrawal date.⁴⁹

Where a state water right does not vest until after 1926, however, that water right is ineffective against the 1926 withdrawal. For example, in *Jack A. Medd*⁵⁰, the Department found that a 1940 permit was ineffective to appropriate the waters of the springs since those waters had been reserved in 1926. The *Medd* decision, standing for the proposition that a state appropriative permit issued subsequent to the 1926 withdrawal is ineffective to confer a right in the permittee, is hereby reaffirmed.

The United States is not required to object to attempts to appropriate those waters under state law at points off the public domain. The private appropriator establishing a right under state law after Apr. 17, 1926, acquires his right with constructive notice that, to the extent of the yield of the reserved source, his right would be subject to the prior rights of the United States, whether exercised prior to or subsequent to the state-sanctioned private use.⁵¹ This is, of course, the necessary result of the general concept of the reserved right, as recognized by the Supreme Court. Considerations of comity suggest, however, that the BLM should object to such attempted appropriations of water subject to a reserved right when it learns about them.

⁴⁹ *See Thomas Morgan*, 52 I.D. 735 (1929); *State of Arizona*, 59 I.D. 14 (1945); *A. T. West & Sons*, *supra*.

⁵⁰ 60 I.D. 79 (1947).

⁵¹ *See* discussion at part III A., *supra*.

6. *Summary of the Effect of the 1926 Order*

From the discussion above considering the plain intent and purpose of the 1926 Executive Order, the congressional acts under which it was issued, and the subsequent Departmental interpretations relative thereto, I have reached the following conclusions concerning the legal effect of the 1926 order:

1. I believe the following definitions are consistent with the Executive Order and the cases construing it; e.g., *Santa Fe Pacific Railroad Co.*, 53 I.D. 210 (1930): For purposes of the Executive Order of Apr. 17, 1926, the term "spring" means a discrete natural flow of water emerging from the earth at a reasonably distinct location whether or not such flow constitutes a source of or is tributary to a water course, pond or other body of surface water. The term "water hole" means a dip or hole in the earth's surface where surface or groundwater collects and which may serve as a watering place for man or animals.

2. The Executive Order withdrew, as of Apr. 17, 1926, all lands containing important springs and water holes, as defined herein, that existed as of that date on vacant, unappropriated, unreserved public lands.

3. The Order does not affect a valid private right to use some or all of the waters of such a source that had vested under the applicable

state laws, custom or usage prior to Apr. 17, 1926.

4. The Order does not withdraw artificially developed sources of water or man-made structures for collection of water on the public domain; however, any interest held in those artificially developed or constructed sources or structures passes to the United States upon abandonment by the developer or his successor in interest by virtue of the United States' ownership of the land.

5. The Order withdraws, by operation of law, lands which become of the character contemplated in the order subsequent to the date of the order; i.e., vacant, unappropriated, unreserved public lands upon which springs or water holes, as defined herein, come into existence after Apr. 17, 1926. (See also para. 8, *infra*.)

6. The Order withdraws, by operation of law, any vacant, unappropriated, unreserved public land upon which is located a spring or water hole, as defined herein, and for which a private vested right to use all of such water under applicable state law, custom and usage has previously existed; upon abandonment or forfeiture of that state water right under the terms of the applicable state law, custom or usage. Of course, a person holding a valid, vested private right to use water of a spring or water hole on vacant, unappropriated, unreserved public lands may transfer that right

in accordance with the applicable state law, but no private right can be perfected after abandonment or forfeiture of a right; *i.e.*, the withdrawal attaches immediately upon forfeiture or abandonment.

7. The Order has withdrawn all lands containing springs and water holes, as defined, and subject to the limitations set forth above, regardless of whether the water source has been the subject of an official finding as to its existence and location.

8. The priority date for the public right to use the waters of a spring or water hole withdrawn by the Order is Apr. 17, 1926, for all public springs or water holes existing on that date. Those public springs and water holes that naturally come into existence at a later date are withdrawn when they come into existence.

9. Any action taken by a private party who did not have a vested state water right prior to Apr. 17, 1926, or had not received appropriate permission from the United States subsequent to that date to make use of a public water hole or spring withdrawn by the Order is a nullity and of no force and effect. Any entry onto the reserved land for such purpose constitutes a trespass.

10. The purposes for which water is reserved under the 1926 Order are (a) stockwatering, (b) human consumption, (c) agriculture and irrigation, including sustaining fish, wildlife and plants as a food and forage sources, and (d) flood, soil, fire and erosion control.

11. Because the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.* (1976), (FLPMA), repealed both authorizing statutes under which the Apr. 17, 1926, Order was issued,⁵² springs and water holes on the public domain coming into existence *after* Oct. 21, 1976 are not withdrawn by the Apr. 17, 1926, Order but must be withdrawn under other, still-existing legislative authority to be effective.

B. Other BLM Reserved Rights

Any other reserved rights which BLM might hold and administer on behalf of the U.S. must have a basis in other statutes or orders pertaining to the public lands. Because most BLM-managed lands are by definition non-reserved public domain, the reserved water rights doctrine is, therefore, not generally applicable.⁵³ Because hundreds of laws and thousands of executive actions over the years have dealt with BLM lands, it is possible that some of these have created reserved rights in addition to those discussed below; however, the discussion that follows addresses the important laws of general applicability. The approach set forth in this opinion should govern examination of any other laws and executive actions not specifically discussed herein.

⁵² Sec. 10 of the Act of Dec. 29, 1916 (formerly 43 U.S.C. § 300 (1970)), and the Pickett Act, 43 U.S.C. § 141 (1970), were repealed by FLPMA's sec. 704(a).

⁵³ The Supreme Court underscored this in the *New Mexico* case by referring to the reservation of water for land which is "withdrawn from the public domain for specific federal purposes." 438 U.S. at 698.

1. *Act of June 16, 1934*

The Act of June 16, 1934, 48 Stat. 977, 30 U.S.C. § 229a (1976), provides⁵⁴ that all oil and gas prospecting permits or leases issued shall be subject to the condition that if water is struck by the permittee or lessee instead of oil or gas, the Secretary, upon finding that the well is capable of producing water "of such quality and quantity as to be valuable and usable at a reasonable cost for agricultural, domestic or other purposes,"⁵⁵ may purchase the well and provide for the use thereof "on the public lands or disposing of such water for beneficial use on other lands * * *."⁵⁶ A previous Solicitor's Opinion held that the United States must obtain a right pursuant to state law in order to use the water of a well withdrawn by the 1934 Act.⁵⁷ This opinion is contrary to the reserved right doctrine and holdings of the Supreme Court⁵⁸ and I therefore overrule that Opinion.

The Departmental regulations relative to this section are contained in 30 CFR, Part 241. These regulations provide that once an oil or gas well is found to be valuable for water production it will be pur-

chased and "the land subdivision which contains the well will, if subject thereto, be held to be withdrawn by Executive Order of Apr. 17, 1926, and reserved for public use pursuant to Section 10 of the Act of December 29, 1916."⁵⁹

Lands containing these types of water wells are actually hybrids, owing their reserved status to the 1916 Act and the 1926 Executive Order as well as the 1934 Act. The priority date for water uses from such a source is the date it was developed. The purposes for which the water could be used are stated in the 1934 Act itself as "agricultural, domestic or other purposes." It is my opinion that the term "other purposes" specified in the 1916 Act is limited by those purposes which I have found established by the 1926 Order.⁶⁰

Water reserved by withdrawals under the 1934 Act may also be used either on or off public lands, but

⁵⁴ 30 CFR 241.5.

⁵⁵ See discussion on page 580, *supra*. The Master-Referee in *Colo. 4, 5, 6, supra*, at p. 328, found that the uses which could be made of the reserved water under the 1934 Act were broader than those purposes encompassed in the 1926 Order and included (1) wildlife and stockwatering, human drinking, (2) flood, soil, fire and erosion control, (3) range improvement, protection and management, (4) agricultural and irrigation uses, (5) watershed protection and securing favorable conditions of water flows and (6) recreational and fish and wildlife uses. I believe the same purposes are encompassed in both the 1934 Act and the 1926 Order, and are narrower than the Master-Referee found with respect to the former, and broader than he found with respect to the latter. See note 33, *supra*.

⁵⁶ This Act initially provided that the land on which such a water well is located "shall be reserved as a water hole under sec. 300 of Title 43." This provision was repealed by FLPMA's § 704(a), which also repealed 43 U.S.C. § 300 (1970). See note 52, *supra*.

⁵⁷ 30 U.S.C. § 229a(a) (1976).

⁵⁸ *Id.*, subsec. (c).

⁵⁹ Opinion of July 20, 1937 (M-28853).

⁶⁰ See, e.g., *Cappaert v. United States*, *supra*; *United States v. New Mexico*, *supra*.

only in accordance with terms prescribed by the Secretary.⁶¹

2. Power Site Withdrawals

43 U.S.C. § 141 (1970)⁶² authorized the President to "temporarily withdraw * * * public lands * * * and reserve the same for water-power sites."

Pursuant to this statute, numerous tracts of land determined to be valuable for development as power sites were reserved from the public domain. Numerous other sites were classified as valuable for power sites by the Secretary through the Geological Survey, pursuant to the authority granted by Congress.⁶³ Any lands so classified are automatically reserved or withdrawn from the public domain for power purposes when an application is filed under sec. 24 of the Federal Power Act for development as a proposed power project.⁶⁴

The development of these reserved lands for power purposes is under the administration of the Federal Power Commission (now

the Federal Energy Regulatory Commission). The Secretary of the Interior retains, however, the authority to administer and manage these lands for all other purposes, and can open such lands to location, entry, or selection under the public land laws, subject to the possibility of power development when it is determined by FERC that the value of such lands for power development will not be harmed by such activity.⁶⁵

It is clear that the only purpose for the reservation of these lands is their value as sites for power development. Because the administration of these lands for this single purpose is not under the jurisdiction of this Department, I find it unnecessary to express an opinion on the question of whether water is reserved for power development on these lands.⁶⁶ I am of the opinion, however, that the uses of these lands for other purposes under the administration of this Department do not carry with them reserved water rights simply because of their reservation as a power site. Even assuming there is a reserved right for power site purposes, these other uses are clearly secondary, authorized uses of the reservation.⁶⁷ Furthermore, any power development of these lands in conjunction with a Bureau of Recla-

⁶¹ See 30 U.S.C. § 229a(c) (1976) which also gives a preference right to make beneficial use of these waters to owner or occupant of adjacent lands.

⁶² *Supra*, footnote 27.

⁶³ The Act of Mar. 3, 1879, 43 U.S.C. § 31 (1976), provides in pertinent part that "(a) The Director of the Geological Survey * * * shall have the direction of the Geological Survey, and the classification of the public lands * * *."

⁶⁴ Sec. 24 of the Federal Power Act of June 10, 1920, 16 U.S.C. § 818 (1976), provides, in pertinent part, that:

"Any lands of the United States included in any proposed project under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the [Federal Power] commission or by Congress."

⁶⁵ 16 U.S.C. § 818 (1976).

⁶⁶ That is, any possible federal claims for a reserved water right on lands withdrawn as power sites would appropriately be made by or through the Federal Energy Regulatory Commission.

⁶⁷ See *United States v. New Mexico*, *supra*, 438 U.S. at 702.

mation project also does not entitle the Bureau of Reclamation to assert a reserved water right because Congress has clearly directed the Bureau of Reclamation to apply to the state for water rights for its projects under section 8 of the Reclamation Act of June 17, 1902.⁶⁸

3. Stock Driveways

Sec. 10 of the Act of Dec. 29, 1916 (43 U.S.C. § 300 (1970)), authorized the withdrawal of public lands from entry for driveways for livestock or in connection with water holes. The purpose of these withdrawals was to allow for the unhampered passage of livestock across the public domain to non-contiguous tracts of both private and public domain lands for grazing purposes, and to provide access to those springs and water holes reserved for livestock watering purposes. I am of the opinion that these water sources located within stock driveways are reserved to the extent necessary to provide for stockwatering during the process of moving livestock through these reserved access corridors. Because FLPMA repealed the authorizing statute under which these withdrawals were issued, water sources on the public domain created *after* Oct. 21, 1976, are not withdrawn under the Act of Dec. 29, 1916, but must be withdrawn under other, still-existing legislative authority to be effective.

4. Oil Shale Withdrawals

The BLM manages the use of the oil shale withdrawals reserved by Executive Order 5327 (Apr. 15, 1930), subsequently amended to allow oil and gas and sodium development in Executive Orders 6016 (Feb. 6, 1933) and 7038 (May 13, 1935). The relevant language of Executive Order 5327 is as follows:

[T]he deposits of oil shale, and lands containing such deposits owned by the United States, be, and the same are hereby, temporarily withdrawn from lease and other disposal and reserved for the purposes of investigation, examination, and classification.

Under the "specific purpose" test formulated in *New Mexico, supra*, it appears that these oil shale withdrawals also withdrew enough water as is reasonably necessary for the "purposes of investigation, examination and classification." The investigation and examination of these oil shale-bearing lands are preliminary steps to classifying these lands as valuable for oil shale development. I find nothing, however, in Executive Order 5327 which would permit the inference of an intent to reserve water for actual oil shale development. Thus, I conclude that, while there is an inferred intent to reserve waters reasonably necessary for preliminary investigation, examination and classification of oil shale-bearing lands, Executive Order 5327 does not, by itself, create any reserve water rights for

⁶⁸ 43 U.S.C. § 383 (1976); *California v. United States, supra*, 438 U.S. 645.

the development of oil shale in the withdrawn area.⁶⁹

5. *The Taylor Grazing Act*⁷⁰

The Taylor Grazing Act established a comprehensive program which allows individual stockraisers to use the public lands for grazing. Congress directed that BLM manage the public domain for grazing purposes so as

to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement and development of the range; and * * * to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate * * * [the public domain].⁷¹

The Taylor Grazing Act did not reserve any land from the public domain, but rather authorized the Secretary to manage the public lands for grazing "[I]n order to promote the highest use of the public lands pending its final disposal * * *."⁷² Moreover, Congress specifically provided in 43 U.S.C.

§ 315b (1976), in pertinent part, that

nothing in this subchapter shall * * * diminish or impair any right to the possession and use of water * * * which has heretofore vested or accrued under existing law validity affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law.

Therefore, no reserved water rights were created by the Act.

6. *O&C Act*

The Oregon and California Railroad Lands and Coos Bay Wagon Road Lands ("O&C lands") were originally part of the public domain which Congress granted to the Oregon and California Co. pursuant to the Act of July 25, 1866 (14 Stat. 239) to build a railroad and to the Coos Bay Wagon Road Co. pursuant to the Act of Mar. 3, 1869 (Stat. L., XV 340-341) to build a wagon road. The grant was subject to conditions which were later determined by the Supreme Court to have been violated, and Congress ordered title revested in the United States.⁷³

⁶⁹ My conclusion is shared by the commentators. For example:

"[The Executive Order's] purposes are clearly stated: Investigation, examination and classification. There is no mention of water, and, more significantly, none of oil shale development. The language of the order cannot support a conclusion that development was intended and it cannot be inferred from the mere act of withdrawal as is possible for the oil shale reserves. Thus the argument that all federal oil shale lands carry with them their own protected water supply, intriguing though it may be, must fail."

Holland, "Mixing Oil and Water: The Effect of Prevailing Water Law Doctrines on Oil Shale Development," 52 Denver L. Rev. 657, 688, (1975).

⁷⁰ 43 U.S.C. § 315 *et seq.* (1976).

⁷¹ 43 U.S.C. § 315a (1976).

⁷² 43 U.S.C. § 315 (1976).

⁷³ In 1908, Congress authorized the Attorney General to file suit against the Oregon and California Railroad Co. for forfeiture of its unsold indemnity lands for violation of its enforceable covenant. The U.S. Supreme Court found for the United States, and remanded the case to Congress for a legislative solution. *Oregon and California R.R. Co. v. U.S.*, 238 U.S. 393 (1915). Congress responded by passing the Act of June 16, 1916 which paid the Railroad Company \$2.50 for each acre of land it was entitled to because of actual construction and vested in the United States title to all land which had been unsold prior to July 1, 1913. In the same 1908 resolution authorizing suit against the Oregon and California Railroad Co. for recovery of its grant, Congress authorized suit against the Coos Bay Wagon Road Co. upon the same grounds. In 1919, while the Company was awaiting appeal to the U.S. Supreme Court after losing

Congress directed that those lands "classified as timber lands, and powersite lands valuable for timber," should be managed "for permanent forest production."⁷⁴

I am of the opinion that the re-vesting of these lands in the United States did not effect a formal reservation of these lands for which the United States may claim a reserved water right, nor did the "O&C" Act do anything more than provide (as did the Taylor Grazing Act) how these lands were to be managed. There are therefore no reserved water rights on "O&C" lands.

7. The Classification and Multiple Use Act of 1964

The Classification and Multiple Use Act of 1964⁷⁵ provided a system for classifying which public lands were to be disposed of under applicable public land laws and which were to be retained for interim multiple use management.⁷⁶ The Act was to be "consistent with and supplemental to the Taylor Grazing Act of June 28, 1934,"⁷⁷ and its purposes were declared to be "supplemental to the purposes for which public lands have been des-

ignated, acquired, withdrawn, reserved, held, or administered."⁷⁸

Since I have determined that the Taylor Grazing Act did not effect the reservation of any water, finding a reservation of water in any classification under the Classification and Multiple Use Act would clearly be inconsistent with the Taylor Grazing Act. Therefore, lands classified under that Act do not have reserved water rights.

8. Wild Horse Ranges

The Act of Dec. 15, 1971,⁷⁹ authorizes and directs the Secretary "to protect and manage wild free-roaming horses and burros as components of the public lands" and furthermore provides that he "may designate and maintain specific ranges on public lands as sanctuaries for their protection and preservation."⁸⁰ The Act does not authorize the withdrawal or reservation of public lands for these ranges, but says that such lands are to be "principally" devoted to providing for the welfare of the wild horses and burros.

It is clear that the animals sought to be protected by this Act need drinking water, but the mere

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in the federal district court, Congress authorized dismissal of the suit and payment to the Company for its interests in the lands upon reconveyance to the United States (40 Stat. 1179-1180). The money paid the Company was the maximum which Congress intended the Company should derive from its original grant.

⁷⁴ 43 U.S.C. § 1181 *et seq.* (1976).

⁷⁵ U.S.C. § 1411 *et seq.* (1970).

⁷⁶ This Act expired of its own terms in 1970.

See 43 U.S.C. § 1418 (1976).

⁷⁷ 43 U.S.C. § 315 (1976).

⁷⁸ 43 U.S.C. § 1416 (1970).

⁷⁹ 16 U.S.C. § 1333 *et seq.* (1976).

⁸⁰ "Range" is defined by the Act, 16 U.S.C. § 1332(c) (1976), as follows:

"[T]he amount of land necessary to sustain an existing herd or herds of wild free-roaming horses and burros, which does not exceed their known territorial limits, and which is devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use management concept for the public lands."

designation of such sanctuaries does not effect a reservation of water for the purpose of wild horse and burro drinking.

9. *Wild and Scenic Rivers*

The Bureau of Land Management administers some of the components of the Wild and Scenic Rivers System.⁸¹ The designation of a river as a wild, scenic or recreational river under this Act explicitly reserves sufficient unappropriated water to fulfill the purposes of the Act.⁸² The scope and purposes of the reserved water rights for these rivers are discussed at part VII *infra*, and will therefore not be repeated here.

10. *The Federal Land Policy Management Act (FLPMA)*

Nothing in the Federal Land Policy and Management Act establishes a reserved right on BLM lands other than those discussed above. In particular, sec. 701(g) of FLPMA, notes to 43 U.S.C. § 1701 (1976), provides in pertinent part as follows:

Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or—

(1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;

(2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control; [⁸³]

⁸¹ The Wild and Scenic Rivers Act, Oct. 2, 1968, 82 Stat. 906, 16 U.S.C. §§ 1271–1287 (1976). *E.g.*, Rio Grande River, New Mexico; Snake River, Idaho and Oregon; Flathead River, Montana; American River, California.

⁸² 16 U.S.C. § 1284(c) (1976).

⁸³ This provision was contained in the Senate version of the bill and adopted by the conferees without debate or explanation as to its meaning.

By neither expanding nor diminishing either state or federal power, this provision maintains the *status quo* with respect to water rights on the public lands.

V. *RESERVED WATER RIGHTS APPLICABLE TO AREAS ADMINISTERED BY THE NATIONAL PARK SERVICE*

The National Park Service (NPS) administers a variety of lands collectively known as the National Park System:

The “national park system” shall include any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational, or other purposes. [⁸⁴]

The following subsections describe the reserved water rights that may be claimed for components of the National Park System under existing precedent.

A. *National Parks*

1. *Pre-1916 National Parks*

The concept of national parks is an American invention. In the period prior to 1916, the early national parks such as Yellowstone (1872), Sequoia (1890), Mount Rainier (1899), and Crater Lake (1902), were established by legislation us-

⁸⁴ Sec. 2(a), Act of Aug. 18, 1970, 84 Stat. 826, 16 U.S.C. § 1c (1970). The inclusion of “water” in the definition of the National Park System clarifies congressional intent that NPS has jurisdiction over activities relating to water areas within system boundaries. See *United States v. Brown*, 552 F. 2d 817 (8th Cir. 1977), cert. denied 431 U.S. 949 (1977); *United States v. Carter*, 339 F. Supp. 1394 (D. Ariz. 1972); 16 U.S.C. § 1a-2(h) (1970).

ing nearly identical "purpose" language:

[Yellowstone was] * * * dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people * * *.

[The Secretary of the Interior] * * * shall make regulations providing for the preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders, within the park, and their retention in their natural condition. The Secretary may, in his discretion, grant leases for building purposes * * * for the accommodation of visitors. He shall provide against the wanton destruction of the fish and game found within the park * * * and generally is authorized to take all such measures as may be necessary or proper to fully carry out the objectives and purposes of this section. [⁸⁵]

These statutes state that the reservation for park purposes includes the preservation of natural resources and natural curiosities, and public enjoyment thereof. In *United States v. New Mexico*, *supra* at 709-11, the Court intimated in *dictum* that the early park legislation's express concern for the natural curiosities and biotic elements would allow the assertion of reserved water rights required to fulfill such purposes. *But see id.*, at 711, fn. 19. Like the 1916 Act discussed below, these broadly articulated purposes

support a variety of reserved water rights, both consumptive and non-consumptive, and the priority date for such claims is the pre-1916 date of each area's enabling legislation.⁸⁶

2. The National Park Service's Organic Act of 1916

When the early parks and monuments were established, there was little coordination of policy and no continuity of personnel. The National Park Service's 1916 organic act provided a centralized administration, and contains an enduring statement of purpose.

The service thus established shall promote and regulate the use of * * * national parks, monuments, and reservations hereinafter specified * * * by such means and measures as conform to the fundamental purpose of said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.⁸⁷ (Italics added.)

This statement of fundamental purpose encompasses a variety of consumptive and non-consumptive reserved water rights necessary to conserve scenic, natural, historic and biotic elements and to provide

⁸⁵ Act of Mar. 1, 1872, 17 Stat. 32-33, 16 U.S.C. §§ 21, 22 (1970); see also Act of Sept. 25, 1890, 26 Stat. 478, 16 U.S.C. §§ 41, 43 (1970) (Sequoia); Act of Mar. 2, 1899, 30 Stat. 993, 16 U.S.C. §§ 91-93 (1970) (Mount Rainier); Act of May 22, 1902, 32 Stat. 202, 16 U.S.C. §§ 121, 123 (1970) (Crater Lake).

⁸⁶ The specific reserved water rights applicable to these pre-1916 National Parks are the water rights described below in subsec. 2, supplemented by any additional reservation purposes stated in the individual park enabling legislation. See part V B. 2, below, on the "relationback" provisions of 16 U.S.C. § 1 (1970) to pre-1916 National Parks.

⁸⁷ Act of Aug. 25, 1916, § 1, 39 Stat. 535, as amended, 16 U.S.C. § 1 (1970).

for sustained public enjoyment thereof.

I conclude that the particular reserved water rights for national park areas encompassed under 16 U.S.C. § 1 include water required for:

1. *Scenic, natural and historic conservation uses*, such as: ecosystem maintenance (e.g., protecting forest growth and vegetative cover, watershed protection, soil and erosion control, lawn watering, fire protection), maintenance of water-related aesthetic conditions (e.g., minimum stream flows and lake levels), and maintenance of natural features (e.g., wilderness protection, geysers, waterfalls).

2. *Wildlife conservation uses*, such as: the protection, reproduction and management of migratory wildlife and birds (e.g., wildlife and bird watering, habitat maintenance, irrigation for hay and other food staples); and the protection, reproduction and management of fish and other aquatic life (e.g., minimum stream flows and lake levels).

3. *Sustained public enjoyment uses*, such as: visitor accommodation uses through NPS and concessioner operations (e.g., campground uses and maintenance, hotel water and sewer uses), public facility uses (e.g., water fountains, sewage), visitor activities (e.g., visitor centers, park office, shop uses) and visitor enjoyment of the scenic, natural, historic and biotic park resources (e.g., trail maintenance, minimum stream flows and lake levels for

water-borne public enjoyment and recreation, hay and watering of horses and mules used by park visitors).

4. *NPS personnel uses* to provide the above uses, such as domestic uses (ranger stations, NPS residences), NPS animal maintenance (e.g., hay and watering of NPS horses and mules).

These enumerated reserved water rights uses for national parks are largely consistent with the Master-Referee and Colorado district court's decree in the *Colorado 4, 5, and 6* litigation, *supra*.⁸⁸ My con-

⁸⁸ The *Colorado 4, 5, and 6* decree found fourteen types of water uses to be within the reserved water rights ambit of 16 U.S.C. § 1 (1970). The decree is consistent with my conclusions in all but the following two respects.

First, the Master-Referee concluded that only concession uses operated by the United States receive reserved water rights. In my view, the 1916 Organic Act clearly envisioned permit and lease concession agreements to provide for accommodation of visitors in parks. Moreover, subsequent congressional action has reinforced the concept that the concession system is the preferred means for providing facilities for public enjoyment of the parks, in furtherance of the fundamental purpose of 16 U.S.C. § 1 (1970). See 16 U.S.C. §§ 20, 20a (1970). Since providing for sustained public enjoyment is one of the fundamental purposes for park reservations under 16 U.S.C. § 1, and the concession system is the congressionally favored method for effecting that fundamental purpose, I conclude that concession uses obtain reserved water rights.

Second, though the Master-Referee appeared to acknowledge reserved water rights for necessary stream flows to permit public water-borne enjoyment and recreation in parks, the Colorado district court held that recreational boating was not a fundamental purpose for park reservations under 16 U.S.C. § 1. In the *Matter of the Application for Water Rights of the United States of America, Water Divisions 4, 5, and 6*, 2-6 (Opinion of Colorado Water Judge Stewart, Oct. 2, 1978). This holding is internally inconsistent with the recognition of reserved water rights for land-based public enjoyment and recreation

clusions on national park reserved water rights are also consistent with the Supreme Court's holding in *New Mexico, supra*. As recognized in that decision, any doubt about the breadth of park system purposes and the concomitant reserved water rights, is resolved by comparing the narrower utilitarian purposes for which national forests were reserved under the 1897 Act. *United States v. New Mexico, supra*, at 709-11. The consistency of my conclusions on national park reserved water rights with *New Mexico* can also be seen from the post-*New Mexico* Colorado district court opinion in *Colorado 4, 5, and 6* (Judge Stewart, Oct. 2, 1978) which did not substantially alter national park reserved water rights in light of *New Mexico*.

The above-defined reserved water rights uses are all intimately related to the fundamental purpose for park reservations, as articulated in 16 U.S.C. § 1 (1970). Thus, I conclude that the above-defined water uses for parks fall within the

fundamental purpose for park reservations, and accordingly receive reserved water rights under the reserved water rights doctrine as recently reiterated in the *New Mexico* decision.

The purposes stated in the 1916 Organic Act attach to all "national parks" created prior to 1916 by virtue of the statutory reference to "national parks" in the general sense. The above-defined reserved water rights carry a priority date as of the date of the individual park's enabling legislation.

3. Post-1916 Acts

The post-1916 Acts establishing new national parks generally state that park protection and administration will be pursuant to the 1916 organic act. See for example 16 U.S.C. § 80d (1976) (King's Canyon National Park), 16 U.S.C. § 90c (1976) (North Cascades National Park), and 16 U.S.C. § 158 (1976) (Big Bend National Park). In any event, 16 U.S.C. § 1 (1970) would be applicable to these subsequent national park units by virtue of its inclusive "national parks" language. Therefore, the purposes outlined in the 1916 Act constitute stated purposes for the individual post-1916 reservations and the reserved water rights described above attach as of the date of an individual park's enabling legislation. Moreover, it is possible that the individual park's enabling statutes may state additional purposes not

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(e.g., maintenance of hiking trails, campgrounds, hay and watering of animals used to enjoy parks). The public enjoyment of certain scenic, natural, historic and biotic park resources can best be obtained through water-borne public enjoyment and recreation (e.g., canoeing, rafting, boating), rather than through land-based public enjoyment and recreation (e.g. hiking, horseback riding). Thus, I conclude that water-borne public enjoyment and recreation is a fundamental purpose for park reservations under 16 U.S.C. § 1 (1970), and that necessary minimum stream flows and lake levels for public enjoyment and recreation may be claimed under the reserved water rights doctrine for national parks.

encompassed by the 1916 Act for which reserved rights may attach.

Congress has taken no action subsequent to 1916 to negate the implied intent contained in the Organic Act that all unappropriated waters necessary to fulfill the purposes of the national parks are reserved as of the date of the enabling legislation. General post-1916 legislation reinforces the principles of federal control over water and paramount protection of park resources. For example, the Act of Mar. 3, 1921, 41 Stat. 1353, 16 U.S.C. § 797a (1970), prohibits licensing of water projects within parks and monuments without the specific authority of Congress. The 1921 Act reaffirms the principle of the 1916 Organic Act that park waters should be reserved for conservation and public enjoyment purposes, and not allocated for conflicting federal (and by implication, state or private) purposes. Moreover, recent legislation confirms the high public value of national parks and provides that actions taken in derogation of park values and purposes shall not be authorized unless specifically directed by Congress.

Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System, as defined in * * * [16 U.S.C. § 1c], shall be consistent with and founded in the purpose established by * * * [16 U.S.C. § 1], to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the

National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.⁸⁰

The purpose of this provision is to ensure that the resources and values of areas in the National Park System are afforded the highest protection and care in governmental decisions. H.R. Rep. No. 95-581, 95th Cong., 1st Sess. 21, 96, 108 (1977); S. Rep. No. 95-528, 95th Cong., 1st Sess. 9, 13-14, 20 (1977). This provision reinforces my conclusion that Congress, by the 1916 Act and other enabling legislation, intended to reserve unappropriated waters necessary to accomplish park purposes, in order to protect the "high public value" of national parks that might otherwise be lost by less secure water rights.

In addition to reserving water rights, the National Park Service is also authorized to acquire water rights in accordance with state law. The Act of Aug. 7, 1946, 60 Stat. 885, 16 U.S.C. § 17j-2(g) (1970), authorizes appropriations to the National Park Service for the:

Investigation and establishment of water rights in accordance with local custom, laws, and decisions of courts, including the acquisition of water rights or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in the administration and public use of the national parks and monuments.⁸¹

⁸⁰ Act of Mar. 27, 1978, § 101(b), 92 Stat. 166, 16 U.S.C.A. § 1a-1 (West Supp. 1979).

⁸¹ This provision was intended to clarify the Service's basic authority to investigate, establish, and acquire water rights, so as to

I do not view the 1946 Act as inconsistent with the principle that, when park lands were set aside, the Congress also intended to reserve the unappropriated waters appurtenant to such lands necessary to accomplish park purposes. The reference to establishing water rights in accordance with court decisions should be read to include authority to establish reserved water rights under applicable Supreme Court decisions. The 1946 Act grants discretionary authority⁹¹ to the NPS to obtain water in compliance with state law and to purchase valid, existing water rights, when it is in

the government's best interest to do so (e.g., if there are not sufficient amounts of unappropriated water available to fulfill park purposes when a park is established). I also view this statute, as apparently does the Supreme Court in the *New Mexico* case, *supra*, at 702, as authorizing the NPS to acquire water rights to carry out *secondary* uses which may be permitted in park areas, but are by definition not among the purposes for which the parks are created. These conclusions are compatible with the provision's scant legislative history.

B. National Monuments

The Antiquities Act of 1906, 34 Stat. 225, 16 U.S.C. § 431 *et seq.*, (1976), empowers the President to proclaim national monuments on lands owned or acquired by the Federal Government containing historic landmarks, historic or prehistoric structures, or other objects of historic or scientific interest, and to reserve adjacent federal lands for the proper care and management of the protected objects. It is well settled that reserved water rights may attach to national monuments. *Cappaert, supra*.

1. Pre-1916 National Monuments

Between 1906 and 1916, the President acted several times to create national monuments. *See, e.g.*, Proc. 658, 34 Stat. 3236 (Devil's Tower National Monument); Proc. 697, 34 Stat. 3266 (Petrified Forest Na-

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avoid points of order to appropriation bills. H.R. Rep. No. 2459, 79th Cong., 2d Sess. 2 (1946). When originally introduced, this provision contained no reference to state or local law. The reference was added, however, at the suggestion of the Committee on Public Lands. 92 Cong. Rec. 9103 (1946). There was no discussion of the underlying reason or need for this amendment on the House floor or in the House Committee Report.

⁹¹ The 1946 Act is readily distinguishable from sec. 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383 (1976), construed in *California v. United States, supra*, to require federal deference to both substantive and procedural state water laws for the appropriation and distribution of federal reclamation project water, except where inconsistent with congressional directives. Sec. 8 provides:

"Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested rights acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *"

Unlike the general discretionary authority of the 1946 Act, the specific and mandatory language of sec. 8 evidences a clear congressional intent to defer to state law in securing of federal water rights.

tional Monument). The proclamations establishing these early national monuments are brief, generally citing the statutory language, naming the landmarks, structures or other objects to be protected, stating that the "public good would be promoted" by the reservation, and giving a land description.

Clearly the proclamations intended to reserve such water as necessary to provide for the proper care and management of the stated landmarks, structures, or objects of historic or scientific interest, the *raison d'être* for the reservation. It is less clear, however, whether the early proclamations also reserved water rights for the protection of other unstated elements of the national monuments (e.g., biological resources) and for their public enjoyment.

In the *Colorado 4, 5, 6* litigation, *supra*, the Master-Referee and Colorado district court approved a decree granting broad reserved water rights for the Colorado National Monument's unstated objects and public enjoyment thereof, carrying a priority date of 1911. This holding is supported by the view that the promotion of the public good is a primary purpose of the monument reservation and that it includes public enjoyment of both stated and unstated monument objectives. Moreover, the holding is supported by the view that the 1916 National Park Service Organic Act, discussed below, merely confirmed the purposes for which national monuments have always been

reserved. Finally, the 1911 priority date for reserved water rights in conserving objects not expressly covered until the 1916 Act is supported by a "relation-back" theory in *Arizona v. California, supra* (Lake Mead National Recreation Area given priority dates of 1929 and 1930 when executive orders withdrew lands "pending determination as to the advisability of including such lands in a national monument," though no national monument was created and Lake Mead National Recreation Area purposes were not expressly stated until 1964), and *United States v. Walker River Irrigation District*, 104 F. 2d 334 (9th Cir. 1939) (where an Indian reservation was given an 1859 priority date when the Indian Commissioner suggested a reservation, though the tract was not formally reserved until 1874). This "relation-back" theory is not inconsistent with the *New Mexico* Court's view of the effect of the 1960 Multiple Use-Sustained Yield Act on national forests, since that statute indicated that the additional purposes were supplemental and subsidiary to the 1897 Organic Act purposes, while the 1916 Act merely confirmed the "fundamental purpose" for which national monuments have always been reserved. Thus, I conclude that pre-1916 national monuments receive the reserved water rights discussed above in the national park context, carrying a priority date of the date of the establishing presidential proclamation.

2. *Effect of the 1916 National Park Service Organic Act*

With the passage of the 1916 National Park Service Organic Act, the purposes of national monuments were explicitly stated for the first time:

[T]he fundamental purpose of said * * * monuments * * * is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. [2]

As previously developed in the national park context, this statement of "fundamental purpose" incorporates the reserved water rights described above which are necessary for scenic, natural, historic and biotic conservation, and sustained public enjoyment thereof. My conclusions on reserved water rights applicable to national monuments were also substantially confirmed in the *Colorado 4, 5, and 6* litigation, where thirteen types of reserved water rights were decreed. The priority date for reserved water rights is the date of the presidential proclamation establishing the national monument reservation. *Cappaert, supra*.

C. *Other Areas Administered by the National Park Service*

In addition to traditional national parks and national monuments, the National Park Service administers

a variety of other areas, such as: national historical parks, national memorial parks, national memorials, national military parks, national battlefields, national historic sites, national seashores, national rivers, national scenic riverways, national scenic trails, national lakeshores, national recreation areas, national parkways and national preserves.

By use of the term "reservation," the general purposes stated in section 1 of the 1916 Act, 16 U.S.C. § 1 (1970), are also applicable to these other areas administered by the National Park Service. Notwithstanding its general applicability, 16 U.S.C. § 1 is almost always reiterated expressly in the authorizations for these other specific system areas. *See*, for example, 16 U.S.C. §§ 245, 264, 459a-1, 460a-2, 460m-5, 460m-12, 460s-5, and 460bb-3 (1976). The general applicability of the 1916 Act was confirmed by the passage of section 2 of the Act of August 18, 1970, 84 Stat. 826, 16 U.S.C. § 1c (1970), which defines the National Park System and expressly makes the Service's general authorities, including the 1916 Act, applicable to all areas of the System to the extent not in conflict with any individual area's specific enabling legislation. The underlying commonality of purpose of these various areas served as a rationale for the 1970 Act. H.R. Rep. No. 91-1265, 91st Cong., 2d Sess. 2 (1970).

²² 16 U.S.C. § 1 (1970).

As a general rule, I conclude that the earlier stated fundamental purposes of 16 U.S.C. § 1 (1970) and resultant reserved water rights apply to these various components of the National Park System, with a priority date as of the establishing statute's enactment. The extent to which particular reserved water rights are applicable to a given area must be determined on a case-by-case basis, involving an interpretation of both 16 U.S.C. § 1 (1970) and the establishing legislation.

VI. RESERVED WATER RIGHTS IN AREAS ADMINISTERED BY THE FISH AND WILDLIFE SERVICE

The Fish and Wildlife Service (FWS) administers a number of areas to which reserved water rights may properly be ascribed. *Arizona v. California, supra*, at 601. Most of these areas are now components of the National Wildlife Refuge System (hereinafter "NWRS"), which consists of:

[A]ll lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas * * *. [83]

The consolidation of management authorities created by the National Wildlife Refuge Administration Act of 1966, is of recent origin, as compared to the organic authorities for the Forest Service (1897) and

the NPS (1916). Unlike the other organic authorities, the National Wildlife Refuge Administration Act does not authorize the reservation of lands of explicitly define the purposes of the NWRS. Prior to 1966, NWRS components were reserved pursuant to an array of individual statutes, executive orders and secretarial public land orders, making these authorities the primary sources for delineating the purposes for which reserved water rights may attach. This part sets forth generic "purposes" for public domain reservations administered by the Fish and Wildlife Service, which may be used in quantifying reserved water rights.

A. Executive Refuge Reservations Prior to the Migratory Bird Conservation Act

Prior to the enactment of the Migratory Bird Conservation Act in 1929, the reservation of land for fish and wildlife purposes took place through Executive action and without any organic legislation defining the purposes for the reservation. Under the "specific purpose" test formulated by the *New Mexico* Court, it appears that reserved water rights attach only to the extent necessary to fulfill the purposes or objectives named in the individual executive orders establishing the reservations. These executive orders are similar in structure, utilizing succinct language to establish preserves for species groups.

In the pre-1910 period, "refuge" reservations were created by the President's implied power under Article II, section 1 of the Constitu-

⁸³ National Wildlife Refuge System Administration Act of 1966, 80 Stat. 927, 16 U.S.C. § 668dd (1970).

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tion, subsequently upheld in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). By 1910, 44 executive orders had established bird reserves. 42 House Doc. 93 (1908); 43 House Doc. 44 (1909). These executive orders generally stated that the identified tract was: "hereby reserved and set apart for the use of the Department of Agriculture as a preserve and breeding ground for native birds."⁹⁴

For the native bird reserves, I infer an intent to reserve sufficient water needed for native bird breeding and the maintenance of native bird⁹⁵ populations (e.g., ecosystem food supply, fire protection, domestic needs of FWS personnel) on the reservation, since this was the stated reason for the creation of the preserves:

After 1910, the Executive branch also had the delegated authority of the Pickett Act, 36 Stat. 847, 43 U.S.C. §§ 141, 142 (1970) to rely on in creating fish and wildlife reserva-

tions for "public purposes." The later executive orders are equally succinct in their language, merely reserving areas as an "elk refuge" (Exec. Order No. 1814, Aug. 25, 1913), "preserves and breeding ground for muskrat and beaver" (Exec. Order No. 4592, Feb. 21, 1927), "breeding ground for wild animals and birds" (Exec. Order No. 5316, Apr. 3, 1930), or similar purpose language. For these and similar executive order reserves, I infer an intent to reserve sufficient water needed for the maintenance of the species (e.g., ecosystem food supply, breeding habitat, fire protection, domestic needs of FWS personnel) mentioned in the executive orders establishing the individual reservations.

These early reservations carry the date of the establishing executive order as the priority date for reserved water rights. Many of these executive order reservations have been subsequently expanded in geographical area and in named purposes by Executive action and legislation. These new purposes and areas carry priority dates as of the date of the expanding legislation or Executive action.

B. Executive Order Reserves Created to Fulfill the Purposes of the Migratory Bird Conservation Act

As originally written, the 1929 Migratory Bird Conservation Act (hereinafter "MBCA"), 45 Stat. 1222, provided for the acquisition of

⁹⁴ See Exec. Order Nos. 357B-D (Oct. 10, 1905), 703-705 (Oct. 23, 1907), and 1041 (Feb. 27, 1909). [Note: The functions of the Secretary of Agriculture relating to the conservation of wildlife, game and migratory birds were transferred to the Secretary of the Interior by the 1939 Reorganization Plan II and are now under the administrative jurisdiction of the Fish and Wildlife Service.]

⁹⁵ Prior to the Migratory Bird Treaty Act, all of wild birds were considered "native" in the sense of being subject to regulation by the states to the exclusion of the Federal Government. Compare *Geer v. Connecticut*, 161 U.S. 519 (1896) (recently overruled by the Supreme Court in its Apr. 24, 1979 opinion in *Hughes v. Oklahoma*), with *Missouri v. Holland*, 252 U.S. 416 (1920). Accordingly, I conclude that the term "native birds" means "all wild birds frequenting the area, whether or not they inhabited the area on the date of the reservation."

"lands, waters and interests therein" to be administered "as inviolate sanctuaries for migratory birds." Additionally, many refuges were reserved from the public domain to more fully effectuate the purposes of the MBCA.

The executive orders reserving such refuges appear to be of two styles, a pre-1939 version which specifically cites the MBCA purposes and post-1939 version which generally cites migratory bird and wildlife refuge purposes.

1. *Pre-1939 language:*

[T]o effectuate further the purposes of the Migratory Bird Conservation Act (45 Stat. 1222) * * * [there is] hereby reserved and set apart * * * as a refuge and breeding ground for migratory birds and other wildlife. Exec. Order No. 7926, 3 CFR 355 (1938-1943 Comp.).

2. *Post-1939 language:*

[R]eserved and set apart * * * as a refuge and breeding ground for migratory birds and other wildlife. Exec. Order No. 8647, 3 CFR 864 (1938-1943 Comp.).

It is clear that either style of executive order creates reserved water rights to the extent "reasonably necessary to fulfill the purposes of the Refuge," since the second style language comes from *Havasu Lake National Wildlife Refuge given such water rights in Arizona v. California, supra*. Though the *Arizona* Court did not focus on purposes for the reservation, but rather on demonstrable management needs in determining the quantity of reserved water rights, subsequent refinements of the reserved water right doctrine would appear to limit such needs to the

extent needed for the specific purposes of maintaining "a refuge and breeding ground for migratory birds and other wildlife." Such reserved water rights include consumptive and non-consumptive water uses necessary for the conservation of migratory birds and other wildlife (e.g., watering needs, habitat protection, ecosystem food supply, fire protection, soil and erosion control) and attendant FWS personnel needs (e.g., refuge staff domestic needs). These reserved water rights carry the priority date of the establishing executive order.

C. *Refuges Created by Statute*

In addition to refuges created by Executive action, several refuges have been created or explicitly authorized by statute, largely within national forest boundaries. See 16 U.S.C. §§ 671-697a (1976).⁹⁶ These statutory refuges obtain reserved water rights in waters unappropriated as of the date of enactment necessary to fulfill stated refuge purposes.

D. *Game Ranges Created by Executive Order*

In addition to establishing the native bird preserves, migratory bird sanctuaries and wildlife refuges described earlier, executive orders have also established game ranges. The language of these executive orders is nearly identical in

⁹⁶ In *New Mexico, supra*, the Supreme Court at least intimated that minimum stream flows could be claimed for fish and game sanctuaries reserved within national forests. See 16 U.S.C. § 694 (1970). However, the Court expressly refrained from reaching the question of what, if any, water Congress reserved under that statute. *New Mexico, supra*, at 711, fn. 19.

terms of purposes for the reservations.

[T]hey are hereby, withdrawn and reserved and set apart for the conservation and development of natural wildlife resources and for the protection of and improvement of public grazing lands and natural forage resources * * * [“]

It is reasonable to presume an intent to reserve water necessary for the conservation and development of wildlife, grazing and forage resources on these game ranges (*e.g.*, irrigation, ecosystem food supply, breeding habitat, fire protection, erosion control), which are under the jurisdiction of the Fish and Wildlife Service. *See* 43 FR 19045, 19046 (May 3, 1978).

E. Refuges Superimposed on Existing Withdrawals

The Executive Branch has also reserved lands for refuge purposes within areas previously withdrawn for power site, reclamation or other purposes. These layered withdrawals were undertaken largely to mitigate fish and wildlife impacts resulting from development, in accordance with the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*

Pertinent examples include:

1. John Day Wildlife Management Area—“reserved for the John

Day Wildlife Management Area of the John Day Lock and Dam Project” (a Corps of Engineers Project). Public Land Order No. 4210, Apr. 24, 1967 (32 FR 6643, Apr. 29, 1967).

2. Havasu Lake National Wildlife Refuge—“reserved and set apart * * * as a refuge and breeding ground for migratory birds and other wildlife * * * [the land] reservation is subject to their use for the purposes of the Parker Dam Project.” Executive Order No. 8647, Jan. 22, 1941 (6 FR 593, Jan. 25, 1941).

These refuges share the common feature of being subject to use under earlier withdrawals.

I conclude that these refuges do obtain reserved water rights for refuge purposes (*e.g.*, habitat maintenance, watering needs, etc.), carrying a priority date as of the date of reservation for refuge purposes. Superimposed refuge reservations, such as the Havasu Lake National Wildlife Refuge, received reserved water rights in *Arizona v. California*, 373 U.S. 546, 601 (1963); 376 U.S. 340, 346 (1964). The fact that such refuges are subject to another withdrawal is a distinction without a difference. *United States v. New Mexico, supra*, continued the traditional rule of the reserved water rights doctrine that water is implicitly reserved to the extent necessary to fulfill the “specific” or “direct” purposes of the reservation. Since the self-evident purpose

¹⁰ Exec. Order No. 8039, 3 CFR 447 (1938–1943 Comp.) (Kofa Game Range, Jan. 25, 1939); Exec. Order No. 7509, 3 CFR 227 (1936–1938 Comp.) (Fort Peck Game Range, Dec. 11, 1936); Exec. Order No. 8038, 3 CFR 446 (1938–1943 Comp.) (Cabeza Prieta Game Range, Jan. 25, 1939).

of these reservations was to create a refuge offering a measure of protection to wildlife, these reservations would obtain reserved water rights necessary for refuge management purposes under existing precedent.

F. Other Refuges, Wildlife Management Areas and Waterfowl Production Areas Created by Executive Order

In addition to refuge reserved in accordance with the Migratory Bird Conservation Act or reserved on existing withdrawals, other components of the National Wildlife Refuge System have been reserved by Executive action. Pertinent examples include:

1. Seedskadee National Wildlife Refuge—"reserved for the Seedskadee National Wildlife Refuge." Public Land Order No. 4834, May 20, 1970 (35 FR 8233, May 26, 1970).

2. Sunnyside Wildlife Management Area—"reserved for management in cooperation with the State of Nevada Sunnyside Wildlife Management Area * * * [under cooperative agreement] the State of Nevada is authorized to manage the withdrawn lands for the conservation of small game and waterfowl." Public Land Order No. 3441, Aug. 21, 1964 (29 FR 12233, Aug. 27, 1964).

3. Gila River Waterfowl Area—"reserved under the jurisdiction of the Interior Department for use by the Arizona Game and Fish Commission in connection with the Gila

River Waterfowl Area Project." Public Land Order No. 1015, Oct. 1, 1954 (19 FR 6477, Oct. 7, 1954).

I conclude that such public domain reservations for refuge, wildlife management or waterfowl production purposes obtain reserved water rights necessary to fulfill stated purposes. The priority date for these reserved water rights is the date of reservation.

G. The Impact of the Refuge Receipts Act, the Refuge Recreation Act and the National Wildlife Refuge Administration Act

The Refuge Receipts Act of 1935, 49 Stat. 383, 16 U.S.C. § 715s(f) (1970), provides for the disposition of receipts from various activities (sale and lease of animals, timber, hay, grass, soil products, minerals, shells, gravel, public accommodations) that Congress recognized were carried out on refuges. Under the specific purpose test of *New Mexico, supra*, these uses would not be accorded reserved water rights.

The Refuge Recreation Act of 1962, 76 Stat. 653, 16 U.S.C. §§ 460k-1 and 460k-4 (1976), provides a congressional directive that refuge areas and fish hatcheries be managed for public recreation where compatible with the primary purposes for which such areas were acquired or established. Since such recreational uses are not a specific purpose for establishing refuges and fish hatcheries, recreational uses would obtain no reserved water rights under *New Mexico*.

As developed earlier, the National Wildlife Refuge Administration Act of 1966, 16 U.S.C. §§ 668dd-668ee (1976), applies to:

[A]ll land, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas * * *. [16 U.S.C. § 668dd(a)(1)]

This includes the areas discussed in subsections A-F of section VII. While the Act does not appear to establish any new purposes for the new National Wildlife Refuge System, this consolidating statute did confirm that public recreational use and accommodations are subsidiary or secondary uses of wildlife refuges:

(1) The Secretary is authorized, under such regulations as he may prescribe, to—

(A) permit the use of any area within the System for * * * *public recreation and accommodations*, and access whenever he determines that such uses are *compatible with the major purposes* for which such areas were established. [Italics added.] [98]

Thus, reserved water rights for public recreational use and accommodations within the Refuge System would not be allowed under existing legal precedent, since they are not direct purposes for reserving the land, but rather allowable secondary uses. See *United States v. New Mexico*, *supra*, at 3015.

H. Fish Hatcheries Created Pursuant to Executive Action

The Fish and Wildlife Service manages fish hatcheries in addition to the National Wildlife Refuge System. The public land orders reserving such fish hatcheries generally state that the areas are "reserved and set apart * * * for fish-cultural purposes" or that the area is "reserved for use * * * [as a] Fish Cultural Station." See Public Land Order No. 617, Nov. 26, 1949 (14 FR 7295, Dec. 6, 1949); Public Land Order No. 1941, Aug. 12, 1959 (24 FR 6713, Aug. 19, 1959). I am of the opinion that these public land orders reserved sufficient unappropriated water for fish-cultural purposes. Since fish hatcheries generally lie at the headwaters of streams, these largely non-consumptive water uses should not adversely affect other uses.

VII. NATIONAL WILD AND SCENIC RIVERS SYSTEM

The Wild and Scenic Rivers Act, 82 Stat. 906, 16 U.S.C. §§ 1271-1287 (1976), contains an express, though negatively phrased, assertion of federal reserved water rights:

Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes. [99]

⁹⁸ 16 U.S.C. § 668dd(d) (1970).

⁹⁹ Sec. 13(c) of the Act, 82 Stat. 917, 16 U.S.C. § 1284(c) (1970) (italics added). The

The legislative history of the Wild and Scenic Rivers Act emphasizes the congressional intent to reserve unappropriated waters necessary to fulfill the Act's purposes. In explaining the conference report on the Senate floor, Senator Gaylord Nelson, a principal sponsor and floor manager of the bill in the Senate, read the following sectional analysis:

Enactment of the bill would reserve to the United States sufficient unappropriated water flowing through Federal lands involved to accomplish the purpose of the legislation. Specifically, only that amount of water will be reserved which is reasonably necessary for the preservation and protection of those features for which a particular river is designated in accordance with the bill. [100]

Thus, the intent to reserve unappropriated waters at the time of river designation is clear and the remaining question is the scope of the reserved water right. The previous-

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preceding subsec., 16 U.S.C. § 1284(b), provides: "Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws."

The meaning of this provision is difficult to discern, especially in light of Congress express invocation of the reserved water rights doctrine in the next subsection. Even without considering sec. 1284(c), no consistent reading of this provision appears possible. Giving literal effect to the "no implied claim * * * as to exemption from State water laws" phrase, denies the literal effect of the "no express or implied * * * denial * * * as to exemption from State water laws" phrase, and vice versa. There is no clarifying legislative history. I therefore must conclude that the provision is a *non sequitor* roughly designed to preserve the *status quo* of federal-state relations in water law under "established principles of law," including the reserved water rights doctrine. 16 U.S.C. § 1284(b).

¹⁰⁰ 114 Cong. Rec. 28313 (Nov. 26, 1968); see also 114 Cong. Rec. 26494 (Sept. 12, 1968); 13 Cong. Rec. 21747-48 (Aug. 8, 1967); S. Rep. No. 491, 90th Cong., 1st Sess. 5 (1967).

ly quoted excerpt suggests that the scope question is to be resolved by examining the purposes of the Act, limited by protecting those features which led to a particular river's designation. The purposes of the Act were to implement the policy section (see 16 U.S.C. § 1272 (1970)). The policy reads in pertinent part:

It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. [101]

It is my opinion that the extent of the water reserved is the amount of unappropriated waters necessary to protect the particular aesthetic, recreational, scientific, biotic and historic features ("values") which led to the river's inclusion as a component of the National Wild and Scenic Rivers System, and to provide public enjoyment of such values.

The required congressional reports for additions to the System will be a fruitful source for determining which features led to the river's designation and, hence, the volume of instream flow and consumptive use intended to be reserved. See 16 U.S.C. § 1275 (1970). For these later added national wild and scenic rivers, it appears that the date Congress formally declares the river to be a wild and scenic river

¹⁰¹ 16 U.S.C. § 1271 (1970).

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pursuant to 16 U.S.C. § 1274, and not the date of study pursuant to 16 U.S.C. §§ 1275-1276, would be the priority date for reserved water rights, unless Congress provides otherwise.¹⁰²

The argument that river designation entails the reservation of the entire flow of system component rivers in all cases is untenable in light of the Act's legislative history. The legislative history indicates that private parties likely could obtain consumptive water rights subsequent to river designation.

It follows that all unappropriated and unreserved waters [following the reserved water right accompanying river designation] would be available for appropriation and use under state law for future development of the area.^[103]

Therefore, it is clear that river designation does not automatically reserve the entire unappropriated flow of the river and an examination of the individual features which led to each component river's designation must be conducted to determine the extent of the reserved water right.

VIII. NATIONAL WILDERNESS PRESERVATION SYSTEM

Under the Wilderness Act of Sept. 3, 1964, 78 Stat. 890, 16 U.S.C. § 1131 *et seq.* (1970), Congress has designated wilderness areas on lands managed by interior agencies; *e.g.*,

Bandelier Wilderness, Bandelier National Monument, New Mexico (designated Oct. 20, 1976); Black Canyon of the Gunnison Wilderness, Black Canyon of the Gunnison National Monument, Colorado (designated Oct. 20, 1976); Medicine Lake Wilderness, Medicine Lake National Wildlife Refuge, Montana (designated Oct. 19, 1976); Point Reyes Wilderness, Point Reyes National Seashore, California (designated Oct. 18, 20, 1976). Wilderness area designation is undertaken for the purpose of preserving and protecting wilderness in its natural condition without permanent improvements or human habitation, to fulfill public purposes of recreation, scenic, scientific, educational, conservation, and historic use.¹⁰⁴ I conclude that formally designated wilderness areas re-

¹⁰⁴ The Wilderness Act contains several congressional statements of purpose for the National Wilderness Preservation System. Under 16 U.S.C. § 1131(a) (1976), wilderness areas are designated for the purpose of "preservation and protection in their natural condition * * * to secure for the American people of present and future generations the benefits of an enduring resource of wilderness." Wilderness is defined by 16 U.S.C. § 1131(c) to be "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain," and is further defined to include an area "retaining its primeval character and influence, without permanent improvements or human habitation * * * [which] has outstanding opportunities for solitude or a primitive and unconfined type of recreation * * * [and] may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value." Finally, 16 U.S.C. § 1133(b) (1976) provides that "wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."

¹⁰² See 113 Cong. Rec. 2147-48 (Aug. 8, 1967).

¹⁰³ 114 Cong. Rec. 23313 (Nov. 26, 1968); see also 114 Cong. Rec. 26594 (Sept. 12, 1968).

ceive reserved water rights necessary to accomplish these purposes.

The uses which may be made of water reserved under the purposes stated in the Wilderness Act are restricted to the maintenance of minimum stream flows and lake levels (*e.g.*, for scenic appreciation and primitive water-borne recreation), and water required for ecological maintenance (*e.g.*, evapotranspiration for natural communities, wildlife watering, fire fighting). Reserved water rights may not be claimed for motor boating or other intensive commercial recreational development within wilderness areas, since such uses are not among the purposes of wilderness designation. *See* 16 U.S.C. §§ 1131(c), 1133(c) (1976). Thus, reserved water rights in wilderness areas will not have significant impact on present or future downstream appropriators.

Two additional provisions of the Wilderness Act deserve discussion because of their effect on the judicial rule of construction implying the reservation of water upon the creation of federal reservations. *See Cappaert and New Mexico, supra*. First, as far as NPS and FWS areas are concerned, it is clear that wilderness designations establish purposes for the creation of the reservations; *i.e.*, designation as wilderness does more than merely authorize secondary uses entailing no reserved water rights.¹⁰⁵ Second,

similar to my conclusions concerning identical language in the Wild and Scenic Rivers Act and National Wildlife Refuge Administration Act, I do not view the provision of 16 U.S.C. § 1133(d) (7) (1976)¹⁰⁶ as undercutting the implied reserved water rights doctrine. Rather, the provision is intended to continue the application of then-existing principles of federal-state relations in water law, which includes the reserved water rights doctrine.

IX. LANDS ADMINISTERED BY THE BUREAU OF RECLAMATION

The Bureau of Reclamation administers large irrigation projects in the 17 Western States and the United States owns the lands upon which the dams, diversion works

supplemental to the purposes for which national forests and units of the national parks and national wildlife refuge systems are established * * *." (Italics added).

By stating that Wilderness Act purposes are "within" existing area purposes, this forecloses any argument that wilderness area designation is subsidiary to other management objectives. *Cf. United States v. New Mexico, supra*, 438 U.S. at 713-15.

¹⁰⁵ The provision provides: "Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal government as to exemption from State water laws."

This language cannot reasonably be construed to prevent reserved water rights from being created by wilderness area designation. The identical language was used four years later in the Wild and Scenic Rivers Act, where Congress went on to invoke the reserved water rights doctrine. *See* 16 U.S.C. § 1284(b) and (c) (1976). Rather, by not constituting either a new claim or a new denial or exemption from state water law, I am of the opinion that Congress intended to continue the *status quo* which allows for the creation and assertion of reserved water rights on lands withdrawn and reserved under the Wilderness Act. *See* discussion in fn. 99, *supra*.

¹⁰⁶ This reading of the Wilderness Act is confirmed by 16 U.S.C. § 1133(a) (1976), which provides that the: "purposes of this chapter are hereby declared to be *within* and

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and other supporting facilities are located. These projects have been constructed pursuant to the authority granted by Congress in the Reclamation Act of 1902,¹⁰⁷ and amendatory and supplementary reclamation laws.

Sec. 8 of the Reclamation Act of 1902,¹⁰⁸ provides that

[N]othing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation * * * and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.

This section has been interpreted by the courts as requiring the United States to apply, pursuant to state law, for water rights needed for any proposed Bureau of Reclamation project. In *California v. United States*, *supra*, 438 U.S. at 675, the Court held that

Section 8 * * * requires the Secretary to comply with state law in the "control, appropriation, use, or distribution of water" * * * [and] the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law.

The Court concluded by stating that "the Secretary should follow state law in all respects not directly inconsistent with these [congressional] directives." *Id.* at 678.

It is my opinion that sec. 8 of the 1902 Reclamation Act clearly pro-

hibits the Bureau of Reclamation from claiming any reserved water rights for any reclamation project unless the terms of any project authorization subsequent to 1902 can fairly be read to provide for a reservation of water.¹⁰⁹ I know of none, but have not reviewed the multitude of post-1902 reclamation laws in sufficient detail to say with absolute confidence that none were intended.

X. APPROPRIATION OF
WATER RIGHTS BY
THE UNITED STATES
ON LANDS ADMIN-
ISTERED BY THE BU-
REAU OF LAND MAN-
AGEMENT, BUREAU OF
RECLAMATION, NA-
TIONAL PARK SERV-
ICE AND FISH AND
WILDLIFE SERVICE

Having completed the review of the principal reserved water rights the agencies of this Department may claim, I now return to build on the discussion set forth in parts II and III B above, concerning the acquisition of non-reserved water rights by agencies of this Department.

¹⁰⁰ See also 32 L.D. 254 (1903), holding that a proposed withdrawal of lands and waters in contemplation of a federal reclamation project would be ineffective to reserve waters because sec. 8 of the Reclamation Act generally requires reclamation project water rights to be obtained in accordance with state law. Broader statements in that opinion concerning the general authority of the United States to reserve waters to carry out purposes of federal reservations are plainly inconsistent with subsequent decisions of the Supreme Court, and are therefore overruled to the extent inconsistent with this opinion.

¹⁰⁷ 43 U.S.C. § 372 *et seq.* (1976).

¹⁰⁸ 43 U.S.C. § 383 (1976).

A. BLM *Non-Reserved Water Rights*

Throughout the history of this Nation, the public lands and the resources thereon have generally been administered for ultimate disposition as Congress has determined to be in the national interest. Congress has generally provided that the beneficiaries of the land grants—such as miners, homesteaders, railroads—would themselves acquire the water rights needed to develop the lands granted and the resources thereon pursuant to state law.¹¹⁰ The United States has never claimed water rights for these ultimate beneficiaries of disposed public domain lands (except in the limited situations where Congress has specifically provided for the reservation of water such as in springs and water holes for use on adjoining tracts of public and private lands).

Congress has in other instances, however, provided that public domain lands will be retained by the United States and managed for the particular purposes. The Taylor Grazing Act, *supra*, and FLPMA, *supra*, are the major statutes providing for such retention of lands and providing for multiple-use, sustained yield management of the public domain. While, as I discussed earlier, these acts do not create reserved water rights in the United States, the management programs mandated in these acts require the appropriation of water

by the United States in order to assure the success of the programs and carry out the objectives established by Congress.

My predecessors have held that the BLM has the right to make use of unappropriated water on the public domain to fulfill these management objectives without being limited by the substantive contours of appropriation as defined in the various state water laws. In a 1950 opinion,¹¹¹ Solicitor White found that this inherent power of the United States had been exercised under the Taylor Grazing Act.¹¹² He observed:

As the owner of unappropriated non-navigable water on the public domain, the United States may exercise all powers of ownership over such water. It may withdraw such water generally from private appropriation, as was done in the case of springs and water holes by the Executive order of April 17, 1926, or it may simply make the water in a particular case unavailable for private appropriation through taking it and using it. No specific form of reservation of water is required. Of course, before an officer of the United States can effectively act to exercise the ownership of the United States in unappropriated non-navigable water on public land, he must have the proper authority to do so. In section 2 of the Taylor Grazing Act (43 U.S.C., 1946 ed., sec. 315a), the Secretary of the Interior has been directed to "make provision for the protection, administration, regulation, and improvement" of grazing districts, and to "do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the

¹¹⁰ See, e.g., Desert Land Act, *supra*, pp. 566-571 U.S. v. *New Mexico*, *supra*, at 702, fn. 5.

¹¹¹ *Solicitor's Opinion*, M-33969 (Nov. 7, 1950), "Compliance by the Department with State Laws Concerning Water Rights."

¹¹² 43 U.S.C. § 315a *et seq.* (1976).

land and its resources from destruction or unnecessary injury, to provide for the orderly use, *improvement*, and *development* of the range * * * [italics added].

Section 10 of the act, as amended (43 U.S.C., 1946 ed., sec. 3151), provides that 25 percent of the money received under the act shall be available, when appropriated by Congress, for expenditure by the Secretary of the Interior "for the construction, purchase, or maintenance of range improvements." In addition, section 4 of the Taylor Grazing Act (43 U.S.C., 1946 ed., sec. 315c) specifically provides that reservoirs and other improvements necessary to the care and management of livestock for which grazing permits have been issued may be constructed on public lands within grazing districts under permits issued by the Secretary.

It is my opinion that these statutory provisions give the Secretary of the Interior broad authority to develop the unappropriated non-navigable waters on the public domain within grazing districts and to make such waters available for use by the public for stock-watering purposes. In the exercise of this authority, it is not necessary that the Secretary make a formal reservation of the water; it is sufficient that he (or his authorized representative) exercise such domain and control over the water as to indicate that it is being reserved for public use and is being withdrawn from private appropriation.

I am of the opinion that Solicitor White's comments concerning "ownership" of the unappropriated water on the public domain are overly broad and irrelevant to the right of the United States to make use of such water, and I disavow them to the extent inconsistent with this opinion. As is the case of "ownership" of wild animals, concepts of

"ownership" of unappropriated waters are not determinative in federal-state relations in non-reserved water rights. *See Hughes v. Oklahoma*, S. Ct. No. 77-1439 (Apr. 24, 1979).¹¹³ What matters is that Congress, with few exceptions, has not authorized Interior agencies to transform any inchoate federal "ownership" of unappropriated waters into a federal water management system for private water rights competing with state systems, but rather has directed private parties to seek water under state law. *See* pp. 565-571, *supra*. However, I agree with and reaffirm Solicitor White's conclusion that by congressional directives to administer federal lands for particular management objectives, Interior agencies have the right to appropriate and make beneficial use of unappropriated water on the various federal lands for congressionally authorized management programs.

Solicitor White's further conclusion that mere exercise of "dominion and control over the water" on the public domain by the United States causes the water to be "reserved for public use," and "withdrawn from private appropriation," without further action, is in-

¹¹³ That is, water rights in the arid West are generally considered "usufructuary," i.e., based on a right to use water rather than "ownership" of the corpus of the water. *See generally* R. E. Clark and C. O. Martz, "Classes of Water and Character of Water Rights and Uses," in R. E. Clark *Water Rights and Water Rights*, ¶ 53.2 (1967).

consistent with my conclusion reached earlier concerning the need to comply with state law to the greatest practicable extent, and I thereby overrule it.¹¹⁴

In 1976, Congress passed the Federal Land Policy and Management Act¹¹⁵ which reversed the historic policy of favoring general disposal of the public lands, and directed that, in general, they be retained in federal ownership and managed for the various resource uses and values they have. Sec. 102 of FLPMA, 43 U.S.C. § 1701 (1976), summarizes this management philosophy:

(a) The Congress declares that it is the policy of the United States that—

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

¹¹⁴ See part III B., *supra*. Two earlier Solicitor's Opinions also deserve mention. They were 55 I.D. 371; 55 I.D. 378 (1935), issued shortly after the Supreme Court's decision in *California Oregon Power Co., supra*, and ten years before the United States took the position before the Supreme Court in *Nebraska v. Wyoming, supra*, that the Federal Government retained title to all unappropriated non-navigable water on the public domain. In the first, Solicitor Margold suggested that application might be made to the state for certain water rights in flowing streams subject to appropriation and diversion above or below a federal reservation, to afford "greater security" to the federal right, and to allow these rights to be incorporated into the state system. 55 I.D. at 375, 378. In the second opinion, the Solicitor held that the United States must apply to the state to obtain rights to use underground water made available by wells drilled on unreserved, public domain lands. Read together with Solicitor White's 1950 opinion, (which does not mention the earlier opinions), they illustrate the uncertainty that has abounded in this area of law. I overrule each of them insofar as they are inconsistent with the conclusions expressed in this opinion.

¹¹⁵ 43 U.S.C. § 1701 *et seq.* (1976).

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

* * * * *

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

* * * * *

(11) regulations and plan for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which reflects the Nation's need for domestic sources of minerals, food, timber and fiber.

As part of the management of the public domain lands for multiple use, water is of necessity required to carry out the congressional mandate expressed in FLPMA and other laws. As I have noted, part of that mandate in FLPMA is a maintenance of the *status quo ante* in the relationship between the states and the Federal Government on water. Sec. 701(g), note to 43 U.S.C. § 1701. The *status quo* is a recognition of existing laws and practices, and thus allows for (a) the con-

tinued appropriation of unappropriated nonnavigable waters on the public domain by private persons pursuant to state law, as authorized by the Desert Land Act, (b) the right of the United States to use unappropriated water for the congressionally recognized and mandated purposes set forth in legislation providing for the management of the public domain, and (c) application by the United States to secure water rights pursuant to state law for these purposes. Prior to FLPMA, these purposes, were as Solicitor White discussed, primarily those expressed in the Taylor Grazing Act and related laws. It is my opinion that in FLPMA, Congress authorized the United States to appropriate unappropriated water available on the public domain as of Oct. 21, 1976, to meet the new management objectives dictated in the Act. Two specific examples follow:

1. *Water for such consumptive uses as recreational campgrounds, timber production, and livestock grazing.*

Unappropriated water which is needed by the BLM to carry out Congress management directives in FLPMA, the Taylor Grazing Act, the O&C Act, and other statutes which I have determined in this opinion do not create reserved water rights may be appropriated by the BLM in accordance with this opinion. These purposes are diverse and

found in several statutes, and need not be repeated here.

2. *Instream flows and other non-consumptive uses.*

FLPMA requires BLM to manage the public domain lands for "multiple use" and dictates that the land-use plans to be developed for the public lands include provisions for the protection and enhancement of such things as fish and wildlife resources and scenic values.¹¹⁶ If Congress management directives are to be effectively carried out, water is required for human and fish and wildlife consumption at such places as recreation areas, concession operations, wildlife watering and feeding areas, and for non-consumptive uses to maintain such things as fish and wildlife habitats, scenic values, and areas of critical environmental concern.

B. Bureau of Reclamation

All water needed by the Bureau of Reclamation to operate and maintain its reclamation projects must, by express congressional enactment, be acquired pursuant to state law,

¹¹⁶ See, e.g., sec. 102(a)(8) of FLPMA, which refers to management with consideration given to "fish and wildlife habitat," land in its "natural condition," and "outdoor recreation;" 43 U.S.C. § 1701(a)(8) (1976); sec. 103, which defines "areas of critical environmental concern," "multiple use" and "principal and major uses," with reference to, among other things, fish and wildlife, recreation and natural scenic and scientific values; 43 U.S.C. § 1702(a), (c), (f) (1976); and "rehabilitation, protection and improvements" including "water development and fish and wildlife enhancement;" 43 U.S.C. § 1751(b) (1) (1976).

unless Congress has provided otherwise. 43 U.S.C. § 383 (1976), *California v. United States*, 438 U.S. 645 (1978).

C. Appropriation of Water on Lands Administered by the National Park Service

The National Park Service may appropriate water to fulfill any congressionally authorized function for National Park System areas. These congressionally authorized uses include consumptive and nonconsumptive water uses actually used:

1. to conserve the scenery, natural and historic objects, and wildlife and to provide for public enjoyment of the same in National Park System areas, as authorized by 16 U.S.C. § 1 (1970) (*e.g.* uses outlined in Part V above);

2. in concession operations providing for public use and enjoyment of National Park System areas, as authorized by 16 U.S.C. §§ 3, 17(b), 20 (1970);

3. in the construction and maintenance of rights-of-ways in National Park System areas, as authorized by 16 U.S.C. § 5 (1970);

4. in construction and maintenance of airports in National Park System areas, as authorized by 16 U.S.C. § 7a (1970);

5. in the construction and maintenance of roads and trails in National Park System areas, as authorized by 16 U.S.C. § 8 (1970); and

6. in carrying out various miscellaneous authorities, *e.g.*, 16 U.S.C. §§ 1a-2, 16 and 17j-2 (1970), and the enabling legislation for indi-

vidual areas of the National Park System.

D. Appropriation of Water on Lands Administered by the Fish and Wildlife Service

The Fish and Wildlife Service may appropriate water to fulfill any congressionally authorized use of National Wildlife Refuge System areas and other areas under FWS jurisdiction. The congressionally authorized uses include consumptive and non-consumptive uses actually used:

1. to conserve fish and wildlife and their habitat, as authorized by 16 U.S.C. § 668dd (1970) and individual statutes, executive orders, etc., establishing wildlife refuges, game ranges, bird preserves, etc. (*e.g.*, uses outlined in Part VI above);

2. to provide public accommodation and recreational use of the National Wildlife Refuge System, as authorized by 16 U.S.C. §§ 460k, 460k-1, 668dd(b) (1), 668dd(d) (1) (1970);¹¹⁷

3. in construction and maintenance of easements, as authorized by 16 U.S.C. § 668dd(d) (2) (1970);

4. in managing timber, range, agricultural crops, and animals, as authorized by 16 U.S.C. § 7151(b) (1970); and

¹¹⁷ I do not believe that the provision of 16 U.S.C. § 668dd(1) (1970), "[n]othing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws," in any way prohibits the acquisition of appropriative water rights for NWRS areas. By not constituting a claim or denial to exemption from state water law, this Act preserves the *status quo*. See notes 99, 106, *supra*.

5. in carrying out National Wildlife Refuge System uses established in an individual System component's enabling legislation.

CONCLUSION

In this opinion, my staff and I have engaged in a review of the law relating to reserved and non-reserved water rights which may be claimed by the important land management agencies of this Department. The basic legal framework for the assertion of such rights is in some cases clearly established and in other cases not. When faced with the latter, we have been forced to reach conclusions which represent our best judgment about what Congress has intended in light of applicable judicial guidance, largely in *dicta*.

Having issued this opinion, the important remaining issues in this sensitive area will be in the application of individual laws, regulations, and other executive actions to specific factual circumstances. The principal problem facing agencies in this context is the task of proceeding as rapidly as funds will permit with an inventory of present water uses and needs. This information will enable this office (in consultation with the Justice Department as required where litigation has been filed) to determine what steps are required in each case to establish for the record our entitlement to a firm water supply for our identified uses and needs.

This Department's most extensive experience with the recordation and adjudication of its water rights has been in *Colorado Water Divisions 4, 5 and 6* (see footnote 19; footnote 33; footnote 60; footnote 88; pp. 600-601 *supra*). The result of these proceedings to date has been the granting of most (but not all) of interior agency claims; however, this has not resulted in displacement of private rights to any degree. In reviewing these cases, Dean Trelease has recently agreed that no state or private water user has shown that the United States has destroyed a private right by the assertion of a reserved water right and went so far as to suggest that the approved claims are minimal compared to the total flow of the five rivers.¹¹⁸ While this result may not always obtain, we think it may be typical.

Once reserved rights are quantified, we fully expect that future water rights claims for agencies of this Department will be based largely on appropriation of unappropriated water to meet existing and future congressional directives regarding land management. Such appropriations do not threaten water rights previously established under state law. Thus if the Department's agencies can proceed promptly to quantify their reserved rights, there is ample room

¹¹⁸ Trelease, "Federal Reserved Water Rights Since PLLRC," 54 Denver L. J. 473, 487-92 (1977); see also Corker, "A Real Live Problem or Two for the Waning Energies of Frank J. Trelease," 54 Denver L. J. 499, 504 (1977).

to foresee greater certainty and less antagonism between the states and the Federal Government over these issues.

This opinion was prepared with the assistance of John D. Leshy, Associate Solicitor for Energy and Resources; Gary Fisher, Special Assistant to the Associate Solicitor for Energy and Resources; James D. Webb, Associate Solicitor for Conservation and Wildlife; Tom Lundquist, Sharon Allender, and William Garner, attorneys in the Division of Conservation and Wildlife; John Little, Jr., Regional Solicitor—Denver; Reid Neilson, Regional Solicitor—Salt Lake City; Charles Renda, Regional Solicitor—Sacramento; James Turner, Office of the Regional Solicitor—Sacramento; Jean Lowman, Regional Solicitor—Portland; William Swan, Office of the Field Solicitor—Phoenix; and Steve Weatherspoon, formerly with the Division of Energy and Resources, while he was in that Division.

LEO KRULITZ,
Solicitor.

APPEAL OF OUZINKIE NATIVE CORP.*

4 AN CAB 3

Decided *October 31, 1979*

Appeal from the Decision of the Bureau of Land Management AA-6688-A, 42 FR 62976 (Dec. 14, 1977).

* Not in chronological order.

Reversed in part, affirmed in part.

1. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights

All lands leased prior to Dec. 18, 1971, pursuant to open-to-entry leases which are valid on their face must be excluded from conveyances to Native corporations.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

Neither the Board nor the BLM is the appropriate forum in which to adjudicate the validity of third-party interests created by the State of Alaska.

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Administrative Procedure: Decisions

The Board is bound by statements of Secretarial policy contained in Secretarial Orders published in the *Federal Register*.

4. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights

The date upon which parties to an open-to-entry lease acknowledge their signing of the lease does not effect the facial validity of the lease instrument, even though the acknowledgment date is subsequent to the effective date of ANCSA.

APPEARANCES: David Wolf, Esq. and Robert H. Hume, Jr., Esq., Keane, Harper, Pearlman & Copeland, on behalf of Ouzinkie Native Corp.; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

October 31, 1979

*OPINION BY ALASKA
NATIVE CLAIMS APPEAL
BOARD*

SUMMARY OF APPEAL

The Bureau of Land Management (hereinafter BLM), on Dec. 9, 1977, issued the above-referenced decision to issue conveyance of lands to Ouzinkie Native Corp. (hereinafter Ouzinkie). The conveyance proposed in the decision included lands previously tentatively approved by the BLM for conveyance to the State of Alaska (hereinafter State). The proposed conveyance to Ouzinkie was specified subject to certain "third-party interests, if valid, created and identified by the State of Alaska." These interests included 11 open-to-entry leases, each approximately 5 acres in size. Appellant Ouzinkie Native Corp. appealed the validity of 7 of the 11 open-to-entry leases. Ouzinkie asked the Board to order the BLM to convey to Ouzinkie the lands covered by the seven disputed open-to-entry leases, and asked that the decision to issue conveyance (DIC) contain no reference to the seven leases.

The primary issue before the Board is whether the lands covered by any or all of the contested open-to-entry leases should be excluded from the conveyance or whether, as stated by the BLM, the conveyance to Ouzinkie shall include all such lands but be made "subject to" the leases, "if valid." A preliminary issue is whether and to what extent the Board or the BLM is to adjudi-

cate the validity of the open-to-entry leases, and whether the leases, third-party interests created by the State, existed prior to Dec. 18, 1971.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (hereinafter ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

**PROCEDURAL
BACKGROUND**

On Dec. 22, 1961, the State filed general purposes selection applications for lands near the Native Village of Ouzinkie. On Apr. 24, 1964, decisions to tentatively approve were issued for certain lands within T. 26 S., R. 20 W., Seward meridian, and in 1970 numerous open-to-entry leases for tracts within the subject lands were issued by the State. On Dec. 18, 1971, § 11 of ANCSA withdrew the lands surrounding the Village of Ouzinkie, including the lands in the preceeding State selections, for Native selection. On Sept. 24, 1974, Ouzinkie filed village selection application AA-6688-A for lands located near the village, including lands within the prior State selections.

On Dec. 13, 1977, the BLM issued the above-referenced decision to issue conveyance of lands to Ouzinkie. Certain specified lands, which had been State selected and tentatively approved in part, were found to have been properly selected under village selection application AA-6688-A. Accordingly, the tentative approvals previously given for conveyance of lands to the State were rescinded in part, and the underlying State selection applications accordingly rejected in part.

In its decision to issue conveyance, the BLM found that the subject lands

Do not include any lawful entry perfected under or being maintained in compliance with laws leading to acquisition of title.

In view of the foregoing, the surface estate of the above-described lands * * * is considered proper for acquisition by Ouzinkie Native Corp. and is hereby approved for conveyance pursuant to section 14(a) of the Alaska Native Claims Settlement Act.

Continuing, the BLM provided:

The grant of the above-described land shall be subject to:

* * * * *

3. The following third-party interests, if valid, created and identified by the State of Alaska as provided by section 14(g) of the Alaska Native Claims Settlement Act * * *:

(a) Open-to-entry leases, each approximately 5 acres in size, located in T. 28 S., R. 20 W., Seward Meridian:

1. ADL 52675 * * *
2. ADL 52676 * * *
3. ADL 52677 * * *
4. ADL 52678 * * *
5. ADL 52679 * * *
6. ADL 52680 * * *
7. ADL 52681 * * *

8. ADL 52682 * * *
9. ADL 52683 * * *
10. ADL 52712 * * *
11. ADL 52722 * * *

On Jan. 11, 1978, Ouzinkie filed its Notice of Appeal from the above-referenced decision of the BLM. In its Statement of Reasons, Ouzinkie challenged the validity of 7 of the 11 open-to-entry leases listed by the BLM in the above-referenced DIC. One lease, ADL 52722, was allegedly terminated Nov. 16, 1972, for failure of the lessee to pay the annual lease payments for 1971 and 1972, but reinstated in 1973 upon payment of the past due payment. In support of said allegations, Ouzinkie submitted copies of 3 letters written by the State of Alaska to the lessee under ADL 52722. The 3 letters constituted, respectively, (1) a notice of default, (2) a notice that the lease had been terminated, and (3) an offer to reinstate the lease. Ouzinkie claims that the subsequent reinstatement was the unauthorized and unlawful creation of a new third-party interest by the State subsequent to Dec. 18, 1971, an act specifically forbidden by § 11(a) of ANCSA.

The 6 other leases contested by Ouzinkie are alleged not to have existed as of Dec. 18, 1971. Open-to-entry leases ADL 52675, ADL 52676, ADL 52680, and ADL 52681 were alleged to have been executed by the State after Dec. 18, 1971. Leases ADL 52678 and ADL 52679 were alleged to have been signed both by the State and by each of the respective lessees subsequent to Dec. 18, 1971. Ouzinkie claimed that the

October 31, 1979

execution of the leases by one or both parties after Dec. 18, 1971, constituted the unauthorized and unlawful creation of new third-party interests by the State subsequent to Dec. 18, 1971; acts specifically foreclosed by § 11(a) of ANCSA.

Prior to Ouzinkie's filing of its Notice of Appeal, the Secretary of the Interior issued Secretarial Order No. 3016, 85 I.D. 1 (1977), which declared that State of Alaska open-to-entry leases, including the lessee's statutory option to purchase the lands so leased, were valid existing rights protected pursuant to § 14(g) of ANCSA. The Secretary therein concluded that conveyances to Native corporations should be issued subject to such open-to-entry leases, and that the purchase option could subsequently be exercised. This Board was subsequently notified that the Secretary of the Interior had decided to reconsider Order No. 3016. Pending reconsideration, the Board suspended further action in this appeal.

On Nov. 20, 1978, the Secretary of the Interior issued Order No. 3029, 43 FR 55287 (Nov. 27, 1978). Order No. 3029 (hereinafter Order) reaffirmed the Secretary's position in Order No. 3016 that rights created pursuant to the State of Alaska's open-to-entry lease program were valid existing rights within the meaning of ANCSA. Revising his earlier position that conveyances of land under ANCSA should be issued subject to pre-

viously issued open-to-entry leases, the Secretary declared that land covered by such leases should be excluded from conveyances to Native corporations.

On Dec. 4, 1978, the Board terminated the suspension of action in this appeal and directed all parties to file, within thirty (30) days from receipt of its Order, any further briefing. Ouzinkie thereupon filed its Statement of Interest Affected and Statement of Reasons, to which BLM replied. Ouzinkie's Statement of Reasons was accompanied by the signature pages to the 6 leases alleged not to have been executed prior to Dec. 18, 1971, and by copies of the 3 letters of the State to the holder of the seventh contested lease regarding termination and reinstatement of his lease. Pursuant to a subsequent order of the Board, Ouzinkie filed complete copies of the 7 contested leases. On Aug. 6, 1979, the Board ordered further briefing. In response to said Order, briefs were filed by Ouzinkie, BLM, and the State.

DECISION

Ouzinkie has requested that the Board (1) adjudicate the contested open-to-entry leases, (2) find those leases invalid, and (3) include the land covered thereby within the lands to be conveyed to Ouzinkie.

[1, 2] Order No. 3029 mandated that lands tentatively approved for conveyance to the State of Alaska and leased by the State pursuant to its open-to-entry lease program

prior to Dec. 18, 1971, be excluded from conveyances to Native corporations. The Order also stated that the Department is not to adjudicate the validity of such leases:

Neither the Department's regulations nor ANSCA require the Department to determine whether third party interests created by the State are valid under the applicable State law and regulations. The Department is not an appropriate forum to adjudicate these interests. If the State created interest is valid on its face it should be deemed valid for purposes of the conveyance document.

[3] The Board is bound by statements of Secretarial policy contained in Secretary's Orders published in the *Federal Register*. *Appeal of State of Alaska*, 3 ANCAB 129, 136, 86 I.D. 45, 49 (1979) [VLS 78-43]. Thus, where an open-to-entry lease was issued prior to Dec. 18, 1971, and is valid on its face, the land covered thereby is to be excluded from the lands conveyed to a Native corporation.

With regard to open-to-entry lease ADL 52722, there is nothing on the face of the lease instrument indicating that the lease was in fact terminated and then reinstated. The only evidence of such actions before the Board is in the form of copies of 3 letters, none of which constitute part of the lease instrument. Consequently, the Board may not consider the 3 letters in determining the validity of the lease. Examination of the lease instrument reveals nothing that would render the lease invalid. Thus, the lease is valid on its face and, in accordance with Order No. 3029, is deemed valid for purposes of the conveyance document.

With regard to the 6 other contested leases, Ouzinkie alleges that each of the lease instruments was signed by one or both of the parties after December 1971. The dates noted by Ouzinkie, however, do not purport to be the dates upon which the leases were signed. Rather, they are the dates upon which the parties acknowledged their prior signing of the leases.

The language of each lease indicates that it was executed on Sept. 28, 1970. Each of the 6 leases was by its terms "made and entered into this 28th day of September, 1970." Each lease provided that the lessor "does hereby let and demise to the Lessee, and the Lessee * * * does hereby take from the Lessor" the particular tract of land specified therein. The specified term of each lease was 5 years, running from Sept. 28, 1970, through Sept. 27, 1975, and each lease was renewable for an additional 5-year term.

There is nothing in any of the lease instruments specifying that it was signed by either or both parties after Dec. 18, 1971.

[4] Acknowledgment is not essential to the validity of a lease as between the parties. 1CJS Acknowledgments, § 64; *Smalley v. Juneau Clinic Building Corp.*, 493 P.2d 1296, 1301 (Alaska 1972). Without acknowledgment, a lease is complete, valid, and binding as between the parties. The Board concludes that the date upon which the parties to an open-to-entry lease acknowledge their signing of the lease instrument does not effect the facial validity of the lease, even though the ac-

November 9, 1979

knowledge date is subsequent to Dec. 18, 1971.

Accordingly, the Board finds that the subject open-to-entry leases were valid on their face as between the parties as of Sept. 28, 1970, and in accordance with Order No. 3029, the lands covered by the leases are to be excluded from any conveyance to Ouzinkie.

ORDER

It is therefore Ordered that the decision of the Bureau of Land Management here appealed is reversed to the following limited extent:

(a) The BLM's rejection of State of Alaska selection applications A-056426 and A-056427 is reversed insofar as the rejection applies to lands covered by the following open-to-entry leases issued by the State of Alaska:

ADL 52675

ADL 52676

ADL 52678

ADL 52679

ADL 52680

ADL 52681

ADL 52722

(b) Lands covered by the leases specified in (a) shall be excluded from those lands to be conveyed to Ouzinkie Native Corp.

The Bureau of Land Management is hereby directed to take action consistent with this decision.

Open-to-entry leases ADL 52683 and ADL 52712 are not properly the subject of this appeal. Nonetheless, pursuant to Order No. 3029, if upon review by the BLM each of those

two leases appears valid on its face, then it would be appropriate for the BLM to exclude the lands covered by the leases from the conveyance to Ouzinkie.

The holders of the two remaining open-to-entry leases specified by the BLM in the subject decision, ADL 52677 and ADL 52682, have also appealed to this Board. (*Appeal of Schwaab*, ANCAB VLS 78-19). The Board has examined the instruments embodying those two leases and is rendering a separate decisions as to whether the lands covered thereby should be excluded from the conveyance to Ouzinkie.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

ISLAND CREEK COAL CO.

1 IBSMA 285

Decided November 9, 1979

Appeal by the Office of Surface Mining Reclamation and Enforcement from that portion of Administrative Law Judge Tom M. Allen's decision in Docket No. CH9-81-R, issued July 12, 1979, which vacated Violation No. 2 of Notice of Violation No. 79-I-47-10, issued to Island Creek Coal Co. for its purported failure to maintain the coal haul road at the Guyan No. 1-C underground mine (Logan County, West Virginia) in accordance with the requirements of 30 CFR 717.17(j) (3)(i).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Roads: Maintenance

Haul roads shall be maintained, in accordance with 30 CFR 717.17(j), by means that will prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area, to the extent possible using the best technology currently available.

2. Surface Mining Control and Reclamation Act of 1977: Roads: Maintenance

In determining whether there is a violation of the haul road maintenance requirements of 30 CFR 717.17(j) (3) (i), the relevant inquiry is not whether the the road's condition constituted failure to maintain it in view of its use, but whether its condition demonstrated a failure to maintain it in a manner that would prevent adverse impacts on the hydrologic balance in general and additional contributions of suspended solids to streamflow or to runoff outside the permit area in particular.

APPEARANCES: Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia, Shelley D. Hayes, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

*OPINION BY INTERIOR
BOARD OF SURFACE
MINING AND RECLAMATION
APPEALS*

This appeal was filed by the Office of Surface Mining Reclamation

and Enforcement (OSM) from that portion of the Administrative Law Judge's (ALJ's) decision in Docket No. CH9-81-R which vacated Violation No. 2 of Notice of Violation No. 79-I-47-10, issued to Island Creek Coal Co. (Island Creek) for an alleged failure to maintain a coal haul road in accordance with 30 CFR 717.17(j) (3) (i). The ALJ held that Island Creek's testimony was sufficient to overcome OSM's evidence of Island Creek's noncompliance with the Department's regulations. We disagree with this conclusion and, therefore, reverse.

*Factual and Procedural
Background*

On Apr. 3, 1979, OSM Inspectors David Beam, Charles Crumrine, and Dan Pollock inspected Island Creek's Guyan No. 1-C underground coal mining operation in Logan County, West Virginia,¹ and issued Notice of Violation No. 79-I-47-10 to the company on Apr. 4, 1979.² Four violations of the Department's interim regulations were specified: (1) failure to pass all surface drainage through a sedimentation pond or series of sedimentation ponds in violation of 30 CFR 717.17 (a); (2) failure to perform maintenance on the coal haul road by surfacing with a durable, non-toxic,

¹ This inspection was conducted pursuant to sec. 521 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271 (Supp. I 1977), and 30 CFR Part 721 of the Department's interim regulations.

² Notice of Violation No. 79-I-47-10 was issued pursuant to 30 U.S.C. § 1271(a)(3) (Supp. I 1977) and 30 CFR 722.12.

November 9, 1979

non-acid producing material in violation of 30 CFR 717.17(j)(3)(i); (3) placement of material on the downslope side of a road cut in violation of 30 CFR 717.14(c); and (4) failure to provide adequate information on the mine identification sign in violation of 30 CFR 717.12(b).

Island Creek applied for review of this notice on May 4, 1979; a hearing was held before an ALJ on June 6, 1979. Prior to his taking evidence on the circumstances underlying the issuance of the notice, the ALJ granted Island Creek's motion to withdraw from the scope of the review proceeding the violations of 30 CFR 717.17(a) and 30 CFR 717.12(b) indicated in the notice. Thereafter, testimony was received from David E. Beam (Reclamation Inspection Specialist, OSM) and Larry Derenge (District Manager, Island Creek). Additionally, OSM introduced three exhibits relevant to this appeal: (1) a copy of Notice of Violation No. 79-I-47-10; (2) a copy of a document indicating that this notice was terminated by OSM on May 8, 1979, as the result of Island Creek's having abated the conditions giving rise to the specified violation; and (3) a photograph of the coal haul road that is the subject of the violation of 30 CFR 717.17(j)(3)(i) specified in the notice.

On July 12, 1979, the ALJ issued a written decision upholding Violation No. 3 (concerning 30 CFR 717.14(c)) and vacating Violation No. 2 (concerning 30 CFR 717.17

(j)(3)(i)). OSM filed its appeal to the Board from this decision on Aug. 13, 1979, and its brief in support of the appeal on Sept. 14, 1979. Island Creek did not file a brief or otherwise participate in the appeal.

Discussion and Conclusion

30 CFR 717.17, like the analogous regulation applicable to surface mines, sec. 715.17, has as its purpose the prevention of "long-term adverse changes in the hydrologic balance that could result from * * * coal mining operations."³ Changes in water quality are to be minimized, and preventive measures are preferred over treatment methods in achieving this objective.⁴ For this reason 30 CFR 717.17(j), the specific subsection involved in this case, provides that "haul roads * * * shall be * * * maintained * * * so as to * * * prevent additional contributions of suspended solids to stream-flow, or to runoff outside the permit area to the extent possible, using the best technology currently available."⁵ Wetting, scraping, or surfacing are road maintenance practices that may, depending on the

³ 30 CFR 717.17; see also 30 CFR 715.17.

⁴ "Changes in water quality and quantity, in the depth to ground water, and in the location of surface water drainage channels shall be minimized * * *. The permittee shall conduct operations so as to minimize water pollution and shall, where necessary, use treatment methods to control water pollution. The permittee shall emphasize underground coal mining and reclamation practices that will prevent or minimize water pollution and changes in flows in preference to the use of water treatment facilities. * * *." *Id.*

⁵ 30 CFR 717.17(j)(1).

circumstances, meet the requirements of 30 CFR 717.17(j).⁶

[1, 2] The ALJ's decision below concludes its discussion of this violation as follows:

I find that the existence of mud, coal dust, and some ruts on roads over which 100 trips per day are made with vehicles weighing in excess of 100,000 pounds does not constitute the failure to maintain a haul road and that the evidence of the applicant was sufficient to carry the burden of persuasion resulting in the preponderance of evidence in their favor, and violation No. 2 therefore is without merit and should not have been issued.[7]

This finding concerning the condition of the road, however, is not consonant with the purpose of the maintenance requirements. We conclude that the issue is not whether the road's condition "constitute[d] failure to maintain" in view of its use, but whether its condition demonstrated Island Creek's failure to maintain it in a manner that would prevent adverse impacts on the hydrologic balance in general and additional contributions of suspended solids in particular.

OSM's evidence in this case, *e.g.*, photographic Exhibit No. 3 and the inspector's testimony that there were ruts approximately 6 inches deep⁸ and that the road was "covered by mud and coal dust"⁹ and not surfaced with durable material,¹⁰ indicated conditions inconsis-

ent with those preventive purposes. Island Creek's testimony, rather than carrying the burden of persuasion in its favor, corroborated OSM's evidence in that it merely explained the maintenance practices that gave rise to the condition of the haul road observed by OSM's inspector. The district manager stated that the company's normal maintenance practice was to regrade the road and "whenever the running got bad on it, we would resurface it."¹¹ Although Island Creek did not keep maintenance records,¹² the last time the road had been resurfaced with rock was during the winter * * * because we had some problems with it."¹³

It is true, as the ALJ observed, that OSM offered "no testimony or evidence that any of the mud or coal dust on the road contributed to any suspended solids in any stream * * *."¹⁴ However, the photograph of the haul road and the testimony describing its appearance, coupled with the unchallenged opinion testimony of the inspector that "the road was not properly surfaced in the manner which would prevent the addition of additional suspended solids to the

contrast, 30 CFR 717.17(j)(3)(i), which requires the routine maintenance of roads by means including surfacing, does not specify that durable material must be employed in such maintenance. The resurfacing of a road with a durable material may, however, be necessary under some circumstances to maintain a durable material may, however, be 30 CFR 717.17(j). Regardless, however, of the cause of the deficiency, it is the fact of the inadequacy of the roadway conditions and not that cause which is at issue here.

¹¹ Tr. 34.

¹² Tr. 44.

¹³ Tr. 34.

¹⁴ ALJ's Decision at 2.

⁶ 30 CFR 717.17(j)(3)(i).

⁷ ALJ's Decision at 3.

⁸ Tr. 26.

⁹ Tr. 10.

¹⁰ Tr. 14, 23. The ALJ's opinion questions why OSM did not cite Island Creek for a violation of 30 CFR 717.17(j)(2)(iv). This subsection pertains to standards for the construction of roads and includes a requirement that they be surfaced with "durable material." In

M-36893 ON "UNCLAIMED, UNDEVELOPED."

November 19, 1979

waterflow, due to the fact that the road was covered with mud and coal fines,"¹⁵ was sufficient in this particular proceeding to establish a prima facie case which, as we have said, was not contradicted by Island Creek. Thus, the record that is before us establishes that Island Creek's maintenance practices were insufficient to meet the requirements of 30 CFR 717.17(j). The decision below vacating Violation No. 2 of Notice of Violation 79-I-47-10 is therefore reversed.

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

**EFFECT AND IMPLEMENTATION
OF SOLICITOR'S OPINION M-36893
ON "UNCLAIMED, UNDEVELOPED."**

M-36893 (Supp.)

Decided November 19, 1979

**Coal Leases and Permits: Permits:
Generally—Mineral Leasing Act:
Lands Subject to—Multiple Mineral
Development Act: Generally—Phos-
phate Leases and Permits: Permits**

A prospecting permit which embraces land which is not "unclaimed" and "undeveloped" is a nullity and void as a conveyance of any interest in that land.

¹⁵ Tr. 14.

Land in a mining claim remains "unclaimed" land for the purposes of M-36893 so long as the claim is not validated by discovery of a valuable locatable mineral deposit at the date of permit issuance. Surface disturbing mineral activities, associated with delineation of a mineral ore body which could reasonably be expected to disclose knowledge of an area's coal potential constitute development. The bona fide purchaser provisions of sec. 27(h) (2) of the Mineral Leasing Act do not apply to permits which embrace land that is claimed or developed.

**Coal Leases and Permits: Applica-
tions—Mining Claims: Contests—
Phosphate Leases and Permits: Permits**

The BLM should presume the validity of mining claims or the development of mineral leases disclosed by abstracts submitted by the preference right lease applicant, and allow the applicant to pursue the remedy of private contests or, failing that, issue a notice of intent to reject the lease application where claims or development are shown, and allow the preference right lease applicant the opportunity to show, on the record, the invalidity of the claims, or lack of development, or both.

**OPINION BY OFFICE OF
THE SOLICITOR**

TO: SECRETARY

FROM: SOLICITOR

SUBJECT: EFFECT AND IMPLEMENTATION OF SOLICITOR'S OPINION M-36893 ON "UNCLAIMED, UNDEVELOPED."

On Aug. 2, 1977, this office explained the meaning of the identical statutory language in secs. 2(b) and 9(b) of the Mineral Leasing Act of 1920, 30 U.S.C. §§ 201(b)

M-36893 ON "UNCLAIMED, UNDEVELOPED."

November 19, 1979

waterflow, due to the fact that the road was covered with mud and coal fines,"¹⁵ was sufficient in this particular proceeding to establish a prima facie case which, as we have said, was not contradicted by Island Creek. Thus, the record that is before us establishes that Island Creek's maintenance practices were insufficient to meet the requirements of 30 CFR 717.17(j). The decision below vacating Violation No. 2 of Notice of Violation 79-I-47-10 is therefore reversed.

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

**EFFECT AND IMPLEMENTATION
OF SOLICITOR'S OPINION M-36893
ON "UNCLAIMED, UNDEVELOPED."**

M-36893 (Supp.)

Decided November 19, 1979

**Coal Leases and Permits: Permits:
Generally—Mineral Leasing Act:
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**Coal Leases and Permits: Applica-
tions—Mining Claims: Contests—
Phosphate Leases and Permits: Permits**

The BLM should presume the validity of mining claims or the development of mineral leases disclosed by abstracts submitted by the preference right lease applicant, and allow the applicant to pursue the remedy of private contests or, failing that, issue a notice of intent to reject the lease application where claims or development are shown, and allow the preference right lease applicant the opportunity to show, on the record, the invalidity of the claims, or lack of development, or both.

**OPINION BY OFFICE OF
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TO: SECRETARY

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SUBJECT: EFFECT AND IMPLEMENTATION OF SOLICITOR'S OPINION M-36893 ON "UNCLAIMED, UNDEVELOPED."

On Aug. 2, 1977, this office explained the meaning of the identical statutory language in secs. 2(b) and 9(b) of the Mineral Leasing Act of 1920, 30 U.S.C. §§ 201(b)

(1970)¹ and 211(b) (1976), respectively, which limits the issuance of coal and phosphate prospecting permits to "unclaimed, undeveloped" lands. *Solicitor's Opinion* M-36893, 84 I.D. 443 (1977). The 1977 Opinion defined "unclaimed" as "that land which is not subject to a valid mining claim, coal land claim, or any other claim which could ripen into full ownership of the land," 84 I.D. at 446, and stated that a "prospecting permit which includes land embraced in a mining claim is * * * a nullity with respect to that land." 84 I.D. at 454.

I have been asked several questions about the consequences of the 1977 Opinion and about aspects of the statutory language that have not been previously addressed. This Opinion considers the following additional matters:

(1) Are prospecting permits previously issued in "developed" or "claimed" areas void or voidable?

(2) Does the term "unclaimed" refer to the absence of mining claims of any status or only those shown to be valid?

(3) What is meant by the term "undeveloped"?

(4) What procedures should be adopted to ascertain the present status of a prospecting permit? For example, does the holder of a noncompetitive (preference right) lease application have any opportunity to contest a mining claim or rebut evidence of development and, if successful, eliminate any effect

the mining claim or alleged development may have on its permit rights?

(5) Are there any exemptions from the statutory provision as construed in the Opinion? For example, does a noncompetitive (preference right) lease applicant who is a "bona fide purchaser" of the original prospecting permit, or who has made substantial expenditures related to the area covered by the application, have any right to be exempted from the scope of the 1977 Opinion?

For the reasons stated in this Opinion, I conclude that: (1) Prospecting permits previously issued in "developed" or "claimed" areas are void. (2) The term "unclaimed" refers to the absence of mining claims shown to be valid. (3) The term "undeveloped" means the lack of surface mineral activities, associated with the delineation of an ore body or mineral resource, which could reasonably be expected to disclose knowledge of an area's coal or phosphate potential. (4) Holders of noncompetitive (preference right) lease applications have an opportunity, through private contests, submission of evidence of an area's status or by rebutting a show cause order, to show that lands under application were "unclaimed, undeveloped" at the time of prospecting permit issuance. (5) Neither the bona fide purchaser provisions of sec. 27(h)(2) of the Mineral Leasing Act nor the substantial expenditure of monies related to the area covered by an application

¹ Repealed by sec. 4 of the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1083, 30 U.S.C. § 201(b) (1976).

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exempt prospecting permits which embrace lands that are "claimed" or "developed" from the statutory prohibition.

1. *Are Prospecting Permits Issued in "Claimed" or "Developed" Areas Void or Voidable?*

The first question to be addressed is whether a prospecting permit which embraces land which is not "unclaimed" and "undeveloped" is void or voidable. Any attempt to appropriate, by locating a mining claim, land which is not open to appropriation because it is withdrawn or unavailable for some other reason is a nullity and the claim is void ab initio. See *El Paso Brick Co., v. McKnight*, 233 U.S. 250 (1914); *Brown v. Gurney*, 201 U.S. 184 (1906); *W. A. Todd*, 28 IBLA 180 (1976). For example, mining claims located prior to Aug. 11, 1955, on lands withdrawn for powersites are void ab initio. *Earl D. Roberts*, 28 IBLA 286 (1976); *Armin Speckert*, A-30854 (Jan. 10, 1968). Mining claims located on lands classified for disposition under the Recreation and Public Purposes Act, 43 U.S.C. § 869 to 869-4 (1976), are also void ab initio. *Raymond P. Heon*, 76 I.D. 290 (1969); *C. V. Armstrong*, A-30889 (Feb. 28, 1968).

Even if the Department subsequently restores previously withdrawn lands to entry and location under the mining laws, this does not revive previously attempted mining locations. *Dorothy L. Benton*, A-30729 (May 31, 1967); *J. P.*

Hinds, 25 IBLA 67, 83 I.D. 275 (1976); *Beverly Trull*, 25 IBLA 157 (1976) (Mining Claim Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1976), did not resuscitate claims located prior to date of Act). See also, *Roy R. Cummins*, 26 IBLA 223 (1976); *Earl D. Roberts, supra*.

Similarly, leases issued by the Department that erroneously include land not subject to the Mineral Leasing Act are void and must be cancelled. *Oil Resources, Inc.*, 14 IBLA 333 (1974) (noncompetitive oil and gas lease in a wildlife refuge is a nullity); *O. D. Presley*, 21 IBLA 190 (1975) (cancellation of oil and gas lease covering land previously patented with no mineral reservation); *Amerada Hess Corp.*, 24 IBLA 360, 83 I.D. 194 (1976) (cancellation of attempted lease of lands underlying railroad right-of-way which did not reserve mineral estate in United States); *Harold H. Sternberg*, A-30700 (May 25, 1967) (cancellation of lease containing land already included in outstanding lease); *David A. Provinse*, 27 IBLA 376 (1976) (cancellation of a noncompetitive oil and gas lease which included land within a previously known geological structure); see *Solicitor's Opinion*, 74 I.D. 295 (1976); see also *Boesche v. Udall*, 373 U.S. 472 (1963).

Both these lines of cases reach the same result: an attempted appropriation of land which is not available for mining or subject to leasing is void. The mining cases also hold

that the subsequent availability of such land to entry and location will not operate to reinstate or validate previously attempted claims. While there are no cases deciding this point with respect to leasing activities, the analogous result is logical.²

The foregoing reinforces the conclusion of Opinion M-36893 that a prospecting permit which embraces land included in a valid mining claim is a nullity with respect to that land.

2. *Does the Term "Unclaimed" Refer to the Absence of Mining Claims of Any Status or Only Those Shown to be Valid?*

The discovery of a valuable mineral deposit is the *sine qua non* for a valid mining claim. *Cole v. Ralph*, 252 U.S. 286 (1920); *Lawson v. United States Mining Co.*, 207 U.S. 1 (1907); *Davis v. Nelson*, 329 F.2d 840 (9th Cir. 1964); *United States v. Bechthold*, 25 IBLA 77 (1976). This is merely an expression of the requirement of the mining law itself. See R.S. § 2319, 30 U.S.C. § 22 (1976). To be valid the discovery of a valuable mineral deposit must be within the limits of the claim. *United States v. Zweifel*, 508 F.2d 1150 (10th Cir. 1975), *cert.*

denied, 423 U.S. 829 (1976); *United States v. Vaux*, 24 IBLA 289 (1976). For a discovery in the case of lode claims there must be "tangible proof of the existence of the vein * * * bearing sufficient mineralization" to meet the prudent-man test.³ *Henault Mining Co. v. Tysk*, 419 F.2d 766 (9th Cir. 1969), *cert. denied*, 398 U.S. 950 (1970); *United States v. Vaux*, *supra* at 298.

The recordation of a certificate or notice of location, while it casts a cloud upon the title of the United States to lands covered by location, is not sufficient to establish a claim's validity absent discovery. *Davis v. Nelson*, 329 F.2d 840 (9th Cir. 1964); *cf. Cameron v. United States*, 252 U.S. 450 (1920).

Thus, where there has been a location, but no discovery, a claimant has not established a valid mining claim.

A mining location by itself gives the locator the exclusive right to prospect, during his actual occupation of the land, against subsequent locators. See 30 U.S.C. § 26 (1976). A location by itself, however, does not constitute a claim to title (a claim having earned the right to apply for patent) since discovery is the *sine qua non* of such claim to title, *cf. Cole v. Ralph*, *supra*; *Lawson v. United States Mining Co.*, *supra*; *Davis v. Nelson*, *supra*, and

² While there appear to be no cases addressing this point, i.e., whether leases of public domain lands not open to appropriation become effective without further action when those lands subsequently become open, there are cases holding that lease application filed for lands before those lands are open to leasing must be rejected and cannot be held pending future availability of the land. See, *Curtis H. Thompson*, 74 I.D. 168 (1967); *Ethel C. Radzewicz*, A-30866 (Jan. 29, 1968). See 43 CFR 2091.1(e).

³ The prudent man test requires a showing of mineralization, both in quality and quantity, which would warrant the further expenditure of money and effort by an individual of ordinary prudence in a reasonable expectation of developing a valuable mine. *United States v. Coleman*, 390 U.S. 599 (1968); *Christman v. Miller*, 197 U.S. 313 (1905), approving *Castle v. Womble*, 19 L.D. 455 (1894).

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thus has no segregative effect against subsequent applicants for the land for the purpose of the "unclaimed" language. Cf. 84 I.D. at 446. Such a conclusion is harmonious with the underlying rationale of my earlier Opinion. That rationale is that knowledge gained from a mining claim should not be used to gain unfair advantage in the issuance of a prospecting permit. In those instances where the mining claim is not valid, but merely a cloud on the United States' title, *i.e.*, where there has been no discovery of a mineral locatable under the mining laws, the claimant most likely has not gained sufficient knowledge of the land's potential for coal or phosphate to be advantaged.⁴

I also hold that the validity of the mining claim is to be tested as of the date the prospecting permit issued. Cf. *United States v. Vaux*, *supra* at 292 (1976); *United States v. Fleming*, 20 IBLA 83, 99 (1975). Thus subsequent discovery on a previously located mining claim would not operate to invalidate a regularly issued existing prospecting permit covering such located land, assuming the land was "undeveloped" at the time the permit was issued.

3. What Is Meant by the Term "Undeveloped"?

There are two questions which need to be answered in defining

"undeveloped." First, what types of development are contemplated—agricultural, residential, mineral, or other? Second, what quantum of development is contemplated? The first is a problem of a kind, while the second is one of degree.

The meaning of this term was not explained in the legislative history of the Mineral Leasing Act, including the 1960 amendments, and it has not been precisely defined in any administrative or judicial decision since then. Its meaning is nonetheless reasonably clear.

Before Congress enacted the Mineral Leasing Act of 1920, the public lands were free and open to mineral exploration, both under the Mining Law of 1872 and under such laws as the Stone Act, 30 U.S.C. § 161 (1976), the Placer Petroleum Act, Act of Feb. 11, 1897, 29 Stat. 526, and the coal land laws. Under the coal land laws system, for example, if a person opened and improved a coal mine, he could obtain the right to purchase those coal lands. R.S. 2348, 30 U.S.C. § 72 (1976). Under each of these laws, individuals and companies conducted considerable exploration and development operations. While most operations were not of the vast scale possible with today's mechanization, many mines were opened with varying degrees of production. There are two situations where mineral activity could show the existence of mineable deposits of coal. The first arises from the nature of some coal deposits in the Western public land states. Coal

⁴One can recognize the logic of this when it is considered that a large number of locations not validated by discovery are so-called "paper claims," filed without any on-the-ground activity.

in these states often has surface outcrops that can be exploited through a shaft or drift mine. Second, hard-rock mines traditionally used drifts of several hundred feet in hopes of encountering hidden lodes or veins of valuable mineral bearing ore. These kinds of activities could be sufficient in some cases to show the presence of mineable coal or phosphate deposits.

Portions of the legislative history of the Mineral Leasing Act show that some members of Congress felt that no prospecting system was needed for coal because its location was so well known. *See e.g.*, 51 Cong. Rec. at 15182 (1914). In my previous opinion I observed that, precisely because so many coal lands were known, Congress deemed it undesirable to issue coal prospecting permits on lands that had been explored for any mineral, including exploration for locatable minerals pursuant to mining claims:

Congress probably determined, in other words, that it is not in the public interest for persons to obtain prospecting permits, and eventually noncompetitive leases, for coal in areas where, under mining claims or through other mineral development, knowledge has already been obtained about the land's potential value for coal. [Footnote omitted.]

84 I.D. at 445.

The Department did consider the meaning of "undeveloped" in *Emil Usibelli*, 60 I.D. 515 (1951). Usibelli protested the issuance of a preference-right coal lease to another on the ground that the prospecting permit was illegally issued because the lands subject to the

permit were "developed." The permit and lease were issued under the Act of Oct. 20, 1914, *as amended* by the Act of Mar. 4, 1921, 41 Stat. 1363 (extending the prospecting permit system to Alaska),⁵ which used the same language as sec. 2 of the Mineral Leasing Act, 38 Stat. 741, *as amended*. These lands were in the Nenana coal field in Alaska. Sec. 1 of the Act of Oct. 20, 1914, 38 Stat. 741, authorized the Secretary to:

[S]urvey the lands of the United States in the Territory of Alaska known to be valuable for their deposits of coal, preference to be given first in favor of surveying lands within those areas commonly known as the Bering River, Matanuska, and Nenana coal fields
* * *

Usibelli alleged that since Congress said that the Nenana coal field was known to be valuable for coal, it was not an undeveloped area. He did not, however, state whether any of the land applied for had been explored by surface-disturbing activity or whether any shafts had been opened or mines improved before the Department issued the prospecting permit. The decision concluded that, despite the language in section 1 of the Act of Oct. 20, 1914, a prospecting permit could be granted for land in the Nenana coal field. The knowledge

⁵ 48 U.S.C. §§ 431-445 (1952). The legislative history of the Act of Mar. 4, 1921, is silent with respect to a definition of "unclaimed, undeveloped." *See* S. Rep. No. 735, 66th Cong., 3d Sess. (1921). The Alaskan coal land laws were repealed by sec. 20 of the Act of July 7, 1958, 72 Stat. 351 and the Act of Sept. 9, 1959, 73 Stat. 490. The 1959 Act wholly incorporated federal coal in Alaska into the Mineral Leasing Act.

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that the lands were in a known coal field, without more, did not remove the area from the category of "undeveloped." 60 I.D. at 519. Although *Emil Usibelli* does not specifically define "undeveloped," it is consistent with the conclusion that the term refers to activities undertaken for the purpose of exploring, defining, opening, or extracting a mineral deposit. See *Sinclair Mines, Inc.*, A-27160 (Aug. 18, 1955) (the Department cannot grant a prospecting permit for lands on which abandoned mines are present). Clearly the term "developed" includes mineral development activities.

Turning to the second aspect, that of degree, a spectrum of activities ranging from prospecting without surface disturbance (by geophysical, geochemical, or other methods) through exploration to actual production could constitute "development." According to the dictionary, "develop" means "to bring out the capabilities or possibilities of" or "to be disclosed; become evident or manifest." *Random House College Dictionary* 363 (L. Urdang ed. 1973). Using this definition, anything tending to show the existence of coal or phosphate would constitute development.

The use of the word "develop" in a mineral context, however, envisages a greater amount of activity. About the time the Mineral Leasing Act was adopted, a publication of the Department, Bureau of Mines Bulletin 95, *A Glossary of the Min-*

ing and Mineral Industry (1920) says that "development" means "work done in a mine to open up ore bodies, such as sinking shafts, and driving levels, etc." *Id.* at 95.

The *Dictionary of Mining, Mineral, and Related Terms* (P. Thrush ed. 1968), the Bureau of Mines publication which revises Bulletin 95, defines "develop" as "[t]o open a mine and ore; * * * To open up ore bodies by shaft sinking, tunneling, or drifting." *Id.* at 317. Related terms are "development drilling" which is defined as "[d]elineation of the size, mineral content, and disposition of an ore body by drilling boreholes," *id.* at 318, and "development" which is defined as the "[w]ork of driving openings to and in a proved ore body to prepare it for mining and transporting the ore." *Id.* at 318.

The question reduces itself to what definition of development is most consistent with the objective Congress sought to achieve in limiting the issuance of prospecting permits to "unclaimed, undeveloped" areas. That objective was, of course, to prevent individuals who possessed knowledge about an area's coal and phosphate resources from profiting thereby by obtaining the opportunity to lease coal or phosphate without competition. Although any activity which might lead to knowledge of an area's coal or phosphate resources—including geochemical or geophysical activity which can occur without disturbing the surface—could reasonably be termed

development for this purpose, the better definition is the one normally used and understood by the mining industry when the law was drafted. I therefore hold that development, in the context of the Act means exploration or development activity associated with the delineation of a mineral body which could reasonably be expected to disclose knowledge concerning an area's coal or phosphate potential. Thus, a single discovery shaft of ten feet on a mining claim to satisfy state law would not ordinarily constitute development, while drilling several holes on a pattern to determine the grade, volume, and three dimensional outline of an ore body would constitute the type of development that would lead to knowledge of an area's coal or phosphate potential. Likewise, the log of a bore hole from a single wildcat oil and gas well may not be the type of development which provides advantageous knowledge to an applicant for, or holder of, a prospecting permit, but an oil and gas lease on which several wells (either producing or not) had been drilled would provide geologic information in the form of well logs which would usually indicate occurrences of coal or phosphate. What is required is a case-by-case review, to determine whether mineral development activity which occurred prior to issuance of a prospecting permit could reasonably have provided knowledge about coal or phosphate potential.

Adopting a narrower definition; *i.e.*, limiting "development" to

those activities conducted after discovery, leading to production of the mineral discovered, would make the word "undeveloped" superfluous. No production can logically occur until a claim is validated by discovery. At that point the location becomes a valid claim, and prospecting permits cannot be issued in such areas consistent with the "unclaimed" limitation. In order to give meaning to both "unclaimed" and "undeveloped," the latter must include activities which can take place before a valid claim being established; *i.e.*, prior to discovery.

I am similarly convinced that nonmineral activities are excluded from the ambit of "undeveloped." The most likely type of nonmineral development is agricultural development under the Homestead Laws. The Department's earliest interpretation of "undeveloped" did not consider agricultural development as barring prospecting permits. The original regulations implementing the Mineral Leasing Act expressly limit the issuance of prospecting permits to unclaimed, undeveloped lands, but go on to say:

Where lands included in a permit have been or may be disposed of with reservation of the coal deposits, a permittee must make full compliance with the law under which such reservation was made * * *.

Circ. No. 679, 47 L.D. 489, 500 (1920), implementing sec. 34 of the Mineral Leasing Act of 1920, 30 U.S.C. § 182 (1976).

The law under which a reservation of leasable minerals could be made is any one of several agricultural disposal laws. Thus the regu-

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lations appear to contemplate the issuance of permits on land already under agricultural development. This contemporaneous construction supports the conclusion, and I so hold, that "undeveloped" in the Mineral Leasing Act refers to mineral development, not agricultural or other nonmineral development.

In enforcing this requirement for pending lease applications, the Bureau should, as part of the adjudication process, examine its kinds of records to determine what kinds of activities took place prior to the issuance of the prospecting permit. If no development activity is discovered in Departmental records, the permit issuance can be considered in compliance with the "undeveloped" limitation; on the other hand, if development activity was evident, the affected portions of the permit should be identified by smallest legal subdivision⁶ and any pending preference right lease application should be rejected to that extent subject to the applicant's right to an opportunity for a hearing.

4. *What Procedures Should be Adopted to Ascertain the Present Status of a Prospecting Permit Which May be in a "Claimed" or "Developed" Area?*

As I pointed out in my earlier Opinion, prior to the Multiple Min-

eral Development Act, 30 U.S.C. §§ 521-531 (1976), the Department consistently interpreted the Mineral Leasing Act to prohibit the issuance of permits and leases for all leasable minerals on lands subject to valid mining claims. *Ohio Oil Co. v. Kissinger*, 58 L.D. 753 (1944). This was merely a variation on the rule that inconsistent claims of right for the same tract must not exist at the same time. *Roos v. Altman*, 54 L.D. 47 (1932). Another, broader statement of this rule is that an allowed entry on public land under the laws of the United States segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially cancelled and removed. *Bunker Hill & Sullivan Mining and Concentrating Co. v. United States*, 226 U.S. 548 (1913); *Hiram M. Hamilton*, 38 L.D. 597 (1910).⁷

This rule is easily followed in the case of activities which require Departmental review of any attempted appropriation. In the case of mining claims, however, prior to the passage of the Federal Land Policy and Management Act of 1976, there was no requirement that a claimant

⁶ By excluding the smallest legal subdivision from a prospecting permit or lease application, the permittee or lease applicant is in exactly the same position he would have been in had the "undeveloped" criteria been applied at the time of permit application. See e.g. 43 CFR 3501.1-3 (1975).

⁷ Shortly after the passage of the 1920 Act, this rule was held to apply to applications filed under the Mineral Leasing Act. *Sullivan v. Tendolle*, 48 L.D. 337 (1921). While applications, permits, or leases do not constitute a technical "segregation" or "entry" of the lands, this same rule was applied to them as a principle of the general administrative rule. *Martin Judge*, 49 L.D. 171 (1922); *Lula T. Pressey*, 60 L.D. 101, 102 (1947), and cases cited therein.

under the Mining Law of 1872 record his claim with the Department.⁸ Until a claimant sought a patent to his claim, he had no responsibility either to notify the Department's Land Office of the existence or location of his claim, or to demonstrate the validity of the claim in the absence of a contest.

This produced the situation where an applicant or entryman for a particular tract would not normally be aware of the existence of mining claims by reference to the Land office records alone. The burdens of proof and presumptions adopted by the Department in response to this situation are explained in *Roos v. Altman*, *supra*, concerning a protest and contest between a stock-raising homestead entryman and a mineral claimant who had applied for patent. In *Roos v. Altman*, *supra* at 54, Assistant Secretary Edwards stated:

In the event that an applicant under other laws seeks to enter or select the land, it is manifestly necessary that the evidence of its condition as to prior occupation and appropriation should be furnished by him. *Kern Oil Co. et al. v. Clarke* (30 L.D. 550, 566).

* * * * *

An affidavit in conformity with Circular No. 738, *prima facie* establishes that the land applied for is not occupied or appropriated under the mining laws, and

⁸ With the requirement of sec. 314 of the Federal Land Policy and Management Act, 43 U.S.C. § 1744 (1976), that mining claims be recorded with the BLM, after October 1979 it will be possible for the Department to determine if there is a pre-existing claim for land which is sought to be appropriated for another use; e.g., prospecting for phosphate, the remaining mineral to which the "unclaimed, undeveloped" language limits the Secretary's permitting authority.

if the entry is *regularly* allowed, the burden will be upon the mineral claimant to show the contrary, and this showing is not deemed to be made unless the mineral claimant established a prior existing location perfected by discovery, or a mining location in the actual possession of the claimant, who is diligently engaged in the search for mineral at the date of the inception of the stock-raising entry. [⁹] *Ainsworth Copper Co. v. Beas* (53 I.D. 382); *United States v. Hurliman* (51 L.D. 258). [Italics in original.]

If this procedural and evidentiary rule were applied to the situation involving coal or phosphate preference right lease applicants, it would mean that their prospecting permits would be considered regular and unaffected by the existence of mining locations claims on the

⁹ *Roos v. Altman*, *supra*, raises the question whether mining locations which are in the actual possession of a locator who is diligently engaged in the search for minerals (under the doctrine of *pedis possessio*) at the date of the issuance of a prospecting permit should also be excluded from the ambit of the permit because of the "unclaimed" language. There are significant differences in the language of the Stock-Raising Homestead Act and the Mineral Leasing Act which cause me to not include mining locations held by *pedis possessio* in the statutory exclusion of secs. 2(b) and 9(b). The Stock-Raising Homestead Act allowed entries on "unappropriated, unreserved" lands, 43 U.S.C. § 291 (1976), while the Mineral Leasing Act allows the issuance of prospecting permits for "unclaimed, undeveloped" lands, 30 U.S.C. §§ 201(b) (1970) and 211(b) (1976). Under the Mining Law of 1872, the source of title to a mining claim is the discovery of a valuable mineral and appropriation in accordance with statutory requirements. *O'Reilly v. Campbell*, 116 U.S. 418 (1886). Location represents an appropriation which segregated lands for the purposes of the Stock-Raising Homestead Act, but that appropriation must be coupled with discovery of a mineral to make the land subject to a mining claim for the purposes of the "unclaimed, undeveloped" language of the Mineral Leasing Act. Thus, the doctrine of *pedis possessio* does not work a further exclusion from the class of lands that may be included in a prospecting permit.

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permit tracts. If, upon the assertion of a superior right by the mining claimant, those existing locations were shown to be valid at the time the permit was issued the permit would be invalid to that extent. This could be accomplished by administratively initiated adjudication or by waiting for the mining claimants to make a showing of the pre-existing validity of their claims.

The rule is potentially distinguishable, however, in that prospecting permittees were not required to furnish evidence of prior occupation or appropriation with their permit applications. This difference can be traced to the statutes involved. Sec. 2 of the Stock-Raising Homestead Act, 43 U.S.C. § 292 (1976), requires an affidavit as to the character of the land.¹⁰ Absent such showing by a prospecting permit applicant,¹¹ the presumption of regularity should not be given to the subsequent prospecting permit applicant and, hence, the burden

would not shift to the mining claimant.

This argument has not been adopted by the Department, however. In the case of oil and gas leases, the Department has followed the rule that if the tract books of the General Land Office show the land to be free from adverse mining claims and subject to lease, then the issuance of the lease is regular and is prima facie valid. *Ohio Oil Co. v. Kissinger, supra*; *A. V. Toolson*, 66 I.D. 48 (1959) (appellants unsuccessfully contended that rejection of a mineral patent application because of existence of an oil and gas lease was improper, claiming pre-existing valid claims).

Thus the possible existence of a mining claim for which no patent application has been filed does not prevent the issuance of a lease under the Mineral Leasing Act for minerals not subject to the "unclaimed, undeveloped" language. If, at a later time, the mining claim is shown to be valid prior to lease issuance, the oil and gas lease must be cancelled. *Marion F. Jensen*, 63 I.D. 71 (1956); *Ohio Oil Co. v. Kissinger, supra*. Both the claim and the lease can exist on the same land until the mining claimant comes forward to assert his interests.

While the procedural method used in the past was to await the assertion of a superior pre-existing right on the part of a conflicting claimant, the Secretary is not limited to this method of establishing the validity or status of indi-

¹⁰ A question arises here as to whether the Department is estopped from retroactively asserting, by regulation under the authority of *Kern Oil Co., supra*, the need for such a showing by an individual currently holding a prospecting permit. If the Department is not estopped, requiring such a showing may operate to invalidate portions of an individual's permit. The contention that this may involve a deprivation of property can be answered by the fact that the statute operates to invalidate portions of the permit and not the requirement for a showing. In the future, this showing should be required by means of a title abstract to be filed with permit applications.

¹¹ The affidavit of 43 U.S.C. § 292 (1976) is required to accompany applications to enter unappropriated public lands which have not been designated as subject to entry. The affidavit acts as a temporary classification of the lands, reserving them from other forms of appropriation.

vidual claims to the public domain. See *Boesche v. Udall, supra*; *Cameron v. United States, supra*. In those instances where leases have been issued for lands which were not available for leasing under the Mineral Leasing Act, the proceedings which have culminated in cancellation of the improperly issued lease have been initiated by the BLM either: on its own motion, *Oil Resources, Inc., supra*; because of notification of land's true status by the Geological Survey, *David A. Provinse, supra*; or because of protests lodged by third parties, *Amerada Hess Corp., supra*; *Marion F. Jensen, supra*.

Waiting for a mining claimant to come forward to contest the validity of the permit does not further the purpose of the "unclaimed" limitation. That limitation is designed to prevent knowledge gained by the mining claimant from ripening into a noncompetitive coal or phosphate lease. If the mining claimant is the same entity as the prospecting permittee, then the claimant's incentive is not to come forward to protect his claim. Even if the claimant and the permittee were not the same, this approach would still encourage permittees to pay claimants not to come forward to assert the validity of their claims.

In order to carry out Congress intent that coal and phosphate prospecting permits only be issued for "unclaimed, undeveloped" lands, the Department must require the permittee to establish the invalidity of the claims found.

In response to the 1977 *Solicitor's Opinion*, the Bureau of Land Management requested each holder of a noncompetitive (preference right) coal or phosphate lease application to submit abstracts showing the presence or absence of mining claims in the lands covered by the application on the date the prospecting permits was issued. Bureau of Land Management Instruction Memorandum No. 77-410 (Aug. 18, 1977). For the purpose of establishing the permit's status, a presumption of validity for any mining claims that are revealed should be adopted. Likewise, it would be presumed that drilling and development had occurred on any oil and gas leases shown. I note that some of the lands involved appear to be covered by locations which do not appear to have ever been valid mining claims. Although the abstract submitted by the noncompetitive (preference right) lease applicant shows that a notice or certificate of location was found in the County Recorder's Office, I have been informed that in some cases corner markers cannot be found, and that discovery shafts or other evidence of mining activity is not evident. As noted above, a mining claim which was not at the time of permit issuance supported by the discovery of a valuable mineral deposit does not render lands "claimed" within the meaning of the statutory provision.

I conclude that the practical way to establish the status of lands covered by a prospecting permit is to

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allow a noncompetitive (preference right) lease applicant to bring a private contest proceeding to establish the invalidity of any mining claims shown in the abstract submitted or to show the lack of the sort of development activities identified in this Opinion on mining claims or other mineral leases. In the event that the lease applicant does not prosecute private contest proceedings or come forward with evidence showing the lack of development, the Bureau of Land Management should issue a Notice of Intent to Reject accompanied by a show cause order. This order could be rebutted by the lease applicant coming forward at that time with evidence showing no development, or a claim's invalidity, or both. Land adjudicated to be within the boundaries of a valid legal claim or in the smallest legal subdivision affected by development is to be excluded from consideration in the adjudication of a noncompetitive (preference right) lease and may not be included in any such lease issued.

5. *Are There Any Exemptions From the Statutory Provision as Construed in the Opinion?*

A. *Is a Bona Fide Purchaser of a Prospecting Permit In a "Claimed" or "Developed" Area Exempt from the Opinion?*

Sec. 27(h)(2) of the Mineral Leasing Act of 1920, as amended, 30

U.S.C. § 184(h)(2) (1976), provides:

The right to cancel or forfeit for violation of any of the provisions of this chapter shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any lease, interest in a lease, option to acquire a lease or an interest therein, or *permit* which lease, interest, option, or *permit* was acquired and is held by a qualified person * * * in conformity with those provisions, even though * * * his predecessor in title * * * may have been canceled or forfeited or may be or may have been subject to cancellation or forfeiture for any such violation. [*Italic's supplied.*]

Congress enacted sec. 27(h)(2) of the Mineral Leasing Act in 1959 in response to expressions of hesitancy by the oil and gas industry to make necessary investments where there was a "danger that in the chain of title of a lease one of its prior holders may have been in violation of the acreage limitation or other provisions of the Act and that the lease might be subject to cancellation for this reason." H.R. Rep. No. 1062, 86th Cong., 1st Sess. 3 (1959).

While Congressional concern was prompted by pending administrative proceedings against lessees in violation of acreage limitations, the language employed in the statute and in the legislative history is broad enough to cover other violations of Mineral Leasing Act provisions. *J. Penrod Toles*, 68 I.D. 285 (1961); *Southwestern Petroleum Corp. v. Udall*, 361 F.2d 650 (10th Cir. 1966). It thus applies where

the predecessor in interest of a bona fide purchaser (BFP) fails to include all land available for leasing in his application, *J. Penrod Toles, supra*, or where an application for lease fails to identify applied for lands correctly, *Duncan Miller, A-30600* (Dec. 1, 1966). The provisions of sec. 27(h) (2) do not, however, invest an individual with BFP rights in cases where only an offer to lease, prior to lease issuance, is assigned. *Herman A. Keller, 14 IBLA 188* (1974); *Leon M. Flanagan, 25 IBLA 269* (1976).

The Interior Board of Land Appeals has also distinguished between violations of the statutory provisions which cause the lease to be voidable and those instances where the lease is void. In the latter instance, sec. 27(h) (2) provides no protection. *Oil Resources, Inc., 14 IBLA 333* (1974); *Skelly Oil Co., 16 IBLA 264* (1974), *rev'd on other grounds, Skelly Oil Co. v. Morton*, Civ. No. 74-411 (D.N.M. 1975). In *Oil Resources, Inc.*, a non-competitive oil and gas lease which was issued for lands in a wildlife refuge which was closed to leasing was held a nullity. Since this lease was a nullity from its inception, the subsequent purchase in good faith and for value was held not sufficient to invest the purchaser with the protection of BFP status. Likewise, in *Skelly Oil Co., 16 IBLA 264*, a noncompetitive lease for lands held to be in a known geologic structure at the time of lease issuance was cancelled as a nullity, with the

same result as in *Oil Resources, Inc.* obtaining for a subsequent purchaser.

While the foregoing cases discuss cancellation of leases, sec. 27(h) (2) of the Mineral Leasing Act expressly applies to permits as well, and therefore the conclusions reached with respect to leases apply to permits. Applying the foregoing to a prospecting permittee in light of the 1977 *Solicitor's Opinion* on "unclaimed, undeveloped," it becomes apparent that the classification of the permittee's interest as void or voidable is dispositive of the issue whether a purchaser of such a prospecting permit can enjoy the protection of the BFP provisions. The limitation that prospecting permits may be issued only on land which is "unclaimed, undeveloped" deals with the character of the land to which the permit may attach. In this regard, it is a condition of the land like the status of the wildlife refuge withdrawn from leasing and the known geologic structure subject only to competitive leasing. A permit embracing lands which are not "unclaimed, undeveloped" is therefore incapable of conveying a mineral interest under the terms of the statute; any permit purporting to convey a mineral interest is a nullity to that extent. Following the reasoning of *Skelly Oil Co., supra*, and *Oil Resources, Inc., supra*, the same conclusion must be drawn with respect to the status of a good faith purchaser for value of a prospecting permit issued in violation of the

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statutory "unclaimed, undeveloped" limitation upon the Secretary's authority to issue permits. In such a case, the BFP provisions of section 27(h)(2) of the Mineral Leasing Act do not provide protection from permit cancellation or lease application rejection.

B. Should Permittees or Lease Applicants Who Have Made Substantial Expenditures Prior to These Opinions Looking to the Development of a Preference Right Lease Be Exempt from the Opinion?

It has been suggested that the earlier Opinion, which exempted previously issued preference right coal and phosphate leases, should also exempt preference right lease applicants who have made substantial expenditures subsequent to the expiration of their prospecting permit on the strength of their belief that a preference right lease for coal or phosphate would be issued to them.

The fact that these prospecting permits are void ab initio to the extent they embrace lands which are "claimed" or "developed" as defined in this and the earlier Opinion, and not merely voidable (see discussion in part 1, *supra*) weighs against the adoption of an exemption to the application of these Opinions on the basis of some sort of substantial expenditures test. Further, it is well established that past erroneous advice or acts by employees of the De-

partment which do not constitute affirmative misconduct will not work to create an estoppel or create rights not authorized by law. *United States v. Ruby Co.*, 588 F.2d 697 (9th Cir. 1978) *cert. denied*, 99 S. Ct. 2838 (1979); *Atlantic Richfield Co. v. Hickel*, 432 F.2d 587 (10th Cir. 1970); *Verner F. Sorenson*, 32 IBLA 341 (1977); *Grady C. Price, Jr.*, 17 IBLA 98 (1974). In an analogous case arising under the mining law, it was held that the fact that a mining claimant had held his claim for many years and performed work on it did not estop the Government from challenging the validity of that claim. Nor was the Government estopped because of its alleged failure to advise the claimant that the land embraced in the mining claim was closed to mining. It was the locator's duty to exercise care in ascertaining the status of the land. *Arthur W. Boone*, 32 IBLA 305 (1977).

Additional difficulty in the adoption of such an exemption lies in the nebulous nature of the substantial expenditures test itself. Should "substantial" be defined as a percentage of an entity's net worth, or should it be an absolute dollar figure? Should one time expenditures count as heavily as several smaller expenditures over a longer period of time? What kind of expenditures should be counted—planning activities; environmental studies, equipment orders, admin-

istrative, and personnel costs? Some expenditures by the permittee are necessary whether there is a reasonable expectation of a preference right lease or not, and drawing a line between these and others undertaken specifically in asserted reliance on expectation of lease issuance is difficult if not impossible.

Given the legal reasoning of this and my prior Opinion, as well as the practical difficulties in fairly establishing a substantial expenditures exemption, I do not believe an exemption to the operation of this and the previous Opinion on the basis of substantial expenditures in mistaken reliance on or expectation of the issuance of a preference right lease is required or appropriate.

Conclusion

I reiterate the conclusions previously expressed in this memorandum.

(1) A prospecting permit which embraces land which is not "unclaimed" and "undeveloped" is a nullity and void as a conveyance of any interest in that land.

(2) Land in a mining claim remains "unclaimed" land for the purposes of M-36893 so long as the claim was not validated by discovery of a valuable locatable mineral deposit at the date of permit issuance.

(3) Surface disturbing mineral activities, associated with delineation of a mineral ore body which could reasonably be expected to disclose knowledge of an area's coal or

phosphate potential constitution development.

(4) The BLM should presume the validity of mining claims or the development of mineral leases disclosed by abstracts submitted by the preference right lease applicant, and allow the applicant to pursue the remedy of private contests or, failing that, issue a notice of intent to reject the lease application where claims or development are shown, and allow the preference right lease applicant the opportunity to show, on the record, the invalidity of the claims, or lack of development, or both.

(5) The BFP provisions of sec. 27(h)(2) of the Mineral Leasing Act do not apply to permits which embrace land that is claimed or developed.

(6) No exemption from any earlier opinion or this one should be established for preference right lease applicants who have expended substantial funds subsequent to the expiration of a prospecting permit in the expectation of securing a preference right lease.

This Opinion was prepared with the assistance of Frederick N. Ferguson, Deputy Solicitor, John D. Leshy, Associate Solicitor for Energy and Resources, Robert Uram (formerly Assistant Solicitor, Branch of Onshore Minerals), Larry McBride, and Kenneth Lee of the Division of Energy and Resources.

LEO KRULITZ,
Solicitor.

H. J. ENEVOLDSEN**44 IBLA 70**Decided *November 20, 1979*

Appeal from decision of the Wyoming State Office, Bureau of Land Management, disqualifying oil and gas lease offer for Parcel WY 2438.

Affirmed as modified.

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Sole Party in Interest

Under the Departmental regulations an offeror in a simultaneous oil and gas lease drawing must sign a statement that he is the sole party in interest, or, if not, submit the statement required by 43 CFR 3102.7. Failure to comply with the regulation requires rejection of the lease offer.

2. Administrative Practice—Administrative Procedure: Adjudication—Oil and Gas Leases: Applications: Sole Party in Interest—Oil and Gas Leases: First Qualified Applicant—Rules of Practice: Protests

Where a protest, with accompanying supporting evidence, alleges that the oil and gas lease offer drawn first in a simultaneous-filing-drawing procedure violated the regulations because a party in interest was not disclosed and there was a multiple filing, the Bureau of Land Management should first afford the drawee an opportunity to respond to the protest before rejecting the offer based on facts alleged in the protest. The error, however, is rendered harmless where on appeal the offeror has full opportunity to make factual submissions and respond to the allegations.

3. Contracts: Generally—Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: Applications: Sole Party in Interest—Words and Phrases

"Interest in an oil and gas lease or offer."

If an oil and gas lease offeror in an oral agreement gives another person "a claim or any prospective or future claim to an advantage or benefit from a lease," there would be an interest in the lease or lease offer which must be disclosed under 43 CFR 3102.7. That an offeror might raise a technical legal defense against enforcement of such an agreement in a court does not militate against there being a claim or avoid the consequence of the disclosure regulation or 43 CFR 3112.5-2 prohibiting multiple filing in drawing procedures.

4. Contracts: Generally—Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: Applications: Sole Party in Interest—Words and Phrases

"Interest in an oil and gas lease or offer."

Where affidavits submitted on appeal by an oil and gas lease offeror disclose that prior to the filing of an oil and gas lease offer the offeror orally agreed to give the person filing the offer for him either the opportunity to refuse to purchase the lease under terms and conditions that a third party would make (right of first refusal), or the opportunity to make the first offer before any other offer would be accepted (first right to buy), the offeror has given the person an interest in the offer as defined in the regulations to include a prospective claim to an advantage or benefit from a lease.

APPEARANCES: Earl H. Johnson, Esq., Denver, Colorado, for appellant; Don M. Fedric, Esq., Hunker-Fedric, P.A., Roswell, New Mexico, for protestant; Patricia Boleyn Walker, Esq., Office of the Regional Solicitor, Depart-

ment of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

H. J. Enevoldsen, of Potter, Nebraska, appeals from the letter decision dated Mar. 7, 1979, by the Wyoming State Office, Bureau of Land Management (BLM), disqualifying his offer to lease Parcel WY 2438. Enevoldsen's offer won first priority in the Wyoming State Office's Dec. 1978 simultaneous oil and gas lease offer drawing. Appellant's offer was disqualified based on evidence submitted by Shackelford Reeder, the number two drawee, protestant, which BLM found to show that appellant was not the sole party in interest for the parcel and that he failed to comply with the disclosure requirements of 43 CFR 3102.7.¹

¹ 43 CFR 3102.7 provides:

"§ 3102.7 Showing as to sole party in interest.

"A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement must be signed by them and the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. All interested parties must furnish evidence of their qualifications to hold such lease interest. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant to the offer. Upon execution of the lease the first year's rental will be earned and deposited in the U.S. Treasury and will not be returnable even though the lease is cancelled."

In his letter of protest protestant charged that there was an agreement or understanding between appellant and a Joseph Sprinkle of Denver, Colorado, which gave Sprinkle "an interest or a claim or prospective claim to an advantage or benefit from any lease to be issued to Enevoldsen," in violation of 43 CFR 3102.7 and 3112.5-2. Protestant based this charge on a considerable amount of evidence, including three affidavits to support the charges.

Without allowing appellant an opportunity to rebut the evidence submitted with the protest, BLM issued its decision disqualifying appellant's offer. On appeal, appellant asserts this failure as error. Appellant further asserts that he was and is the sole party in interest in his lease offer and that protestant's evidence, which BLM accepted, is circumstantial and irrelevant. He submitted numerous affidavits which challenge and deny the veracity of protestant's evidence.

The record reveals the following facts and circumstances. Protestant first became suspicious when a Philip Donaldson of Grand Blanc, Michigan, contacted him. Donaldson told protestant, as set forth in his affidavit, that when he tried to contact appellant to discuss buying the lease, he was referred to appellant's father who said the lease was not for sale and refused to give him appellant's address. Appellant's sister-in-law referred Donaldson to Sprinkle, stating, "[T]he last time they won a Lease, he got it" (Affidavit of Donaldson). Donald-

son checked the Rocky Mountain Petroleum Directory for Sprinkle, and found "Joseph S. Sprinkle Oil Leases," in Denver, Colorado. He then contacted the second drawee, protestant.

Protestant's check of BLM records indicated that in the past other residents of Potter, Nebraska, had assigned leases in very active leasing areas to Sprinkle, retaining unusually low overriding royalty interests. Protestant hired a private investigator, James D. Visser, to contact appellant personally and to determine if any agreement existed between appellant and Sprinkle.

In his affidavit, Visser states that appellant "agreed that he had filed the entry card on behalf of Mr. Sprinkle, and stated that he had been entering the lottery for the last four years for Mr. Joe Sprinkle." According to Visser, appellant told him, "I think we get 50% or something" when questioned about the financial arrangements, and did not know if his father or Sprinkle paid the filing fee. Visser also contacted appellant's father, Don Enevoldsen. He states the father told him, "We have all signed cards for years for Joe Sprinkle." Protestant states that Don Enevoldsen refused to divulge the financial arrangements he had with Sprinkle.

Protestant also hired Esther R. Evans of Laramie County, Wyoming, to search the BLM records relating to oil and gas leases in Wyoming. She found that five appli-

cants who filed on Parcel WY-2438 had won leases in the past and assigned them to Sprinkle, retaining overriding royalty interests of $\frac{1}{2}$ to 1 percent. Based on this evidence submitted by Protestant, BLM disqualified appellant's offer.

On appeal, appellant asserts no other person had an interest in the lease. He submitted affidavits from himself, his father, Joe and Mary Sprinkle, and nine persons who have assigned leases to Sprinkle. These affidavits are discussed, *infra*. For our purposes here, it is sufficient to say that the affiants (other than the Sprinkles) generally state they give Sprinkle a right of first refusal to purchase the lease, but that he has no interest in the lease and they do not have to sell to him.

Protestant filed an answer to appellant's statement of reasons, asserting that appellant's affidavits support a finding of a scheme to allow Sprinkle a better chance to obtain leases. He states that Sprinkle's "sponsored applicants" do not appear to pay filing fees; do not select the parcels filed upon; do not pay rentals; immediately sell any lease won by them to Sprinkle; and retain a noncustomary, nominal overriding royalty interest." He suggests the offerors "understand they must sell to Mr. Sprinkle for that is the 'quid pro quo' for his all-encompassing assistance in placing the applicants in filings." Protestant argues that this right of first refusal contains all the essentials for a contract, is akin to an option, and gives rise to legal and equitable remedies for breach. Protestant sub-

mitted affidavits from an independent consulting geologist and two other disinterested parties, all familiar with oil and gas leasing practices in Wyoming. All three agree the $\frac{1}{2}$ to $1\frac{1}{2}$ percent overriding royalty paid by Sprinkle is abnormally low. Two or three percent is generally expected in highly speculative areas, while 5 percent is considered standard.

The attorney for BLM submitted a motion for expeditious review of the case and also, submitted a brief in support of the State Office's position. First, she asserts that even if BLM should have given appellant an opportunity to be heard prior to issuing its decision, the error was harmless because appellant and Sprinkle both admit Sprinkle had a right of first refusal. Second, she argues this right is an "option" and thus explicitly violates 43 CFR 3100.0-5(b). The fact that "Sprinkle's interest is contingent upon the sale of the lease interest by Appellant which is controlled by Appellant, * * * does not preclude Mr. Sprinkle from holding an 'interest' within the meaning of 43 CFR 3100.0-5(b)." ²

² 43 CFR 3100.0-5(b) provides:

"(b) *Sole party in interest.* A sole party in interest in a lease or offer to lease is a party who is and will be vested with all legal and equitable rights under the lease. No one is, or shall be deemed to be, a sole party in interest with respect to a lease in which any other party has any of the interests described in this section. The requirement of disclosure in an offer to lease of an offeror's or other parties' interest in a lease, if issued, is predicated on the departmental policy that all offerors and other parties having an interest in simultaneously filed offers to lease shall have an equal opportunity for success in the drawings to determine priorities. Additionally, such disclosures provide the means for main-

Appellant submitted a reply brief to protestant's and the Government's arguments. Both protestant and the Government stated that the facts here show a violation of both the sole party in interest requirement, 43 CFR 3102.7, and the prohibition against multiple filing, 43 CFR 3112.5-2. Appellant initially points out that the decision appealed from did not decide the multiple filing issue; therefore, that issue is not involved here. Appellant argues that his use as a layman of the phrase "right of first refusal" has significance only in terms of the intent of the parties, there being no written agreement involved. Appellant, his father, Sprinkle, and the other affiants all assert that Sprinkle has no rights whatsoever in the leases he helps them win. Appellant asserts the statements in their affidavits negate the existence of any contract, agreement or scheme.

Finally, protestant submitted a response to appellant's reply stating that Sprinkle's interest need not be called, or even defined as, an option for it to violate the regulations. He states: "It does not matter that Enevoldsen might not have sold the

taining adequate records of acreage holdings of all such parties where such interests constitute chargeable acreage holdings. An 'interest' in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such 'interests.' Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an 'interest' in such lease."

lease, or might have attempted to refuse to honor Sprinkle's claim, for 43 CFR 3100.0-5(b) requires *disclosure* of the existence of an agreement giving another party an interest in the lease." Protestant last notes that he has contended that the Sprinkle applicants pay neither the \$10 filing fee nor any service fees to Sprinkle; do not reimburse Sprinkle for filing fees paid by him; do not select the parcels; do not pay the rentals when leases are won; and immediately sell leases they win to Sprinkle, retaining unusually low overriding royalty interests. Appellant has not responded to these contentions, nor has he disclosed the amount of the bonus paid for the lease. Viewing all the facts, protestant concludes that the existence of a "scheme to give Sprinkle an advantage in the drawing is quite clear, and both 43 CFR 3102.7 and 43 CFR 3112.5-2 have been violated."

[1] Under the Departmental regulations, an offeror in a simultaneous oil and gas lease drawing must sign a statement that he is the sole party in interest, or submit the statement required by 43 CFR 3102.7 if there are other parties in interest. Failure to comply with this regulation requires rejection of the lease offer. *Alfred L. Easterday*, 34 IBLA 195 (1978).

[2] The BLM decision rested on a finding that this regulation was violated because Sprinkle held an interest in appellant's offer which was not disclosed on the offer. This finding was made solely from the

information in the protest filed with the BLM office Mar. 6, 1979. The BLM decision issued the next day, on Mar. 7, 1979. We agree with appellant to the extent of stating that this action by BLM was premature and procedurally improper in this case. BLM's decision was based upon alleged statements of the appellant and others not made in writing to BLM, but made to another person and reported by that person. The facts alleged were in charges made by a protestant not reflected in the record except in the protest materials.

Although it has been recognized that there is no vested right in an oil and gas lease offeror to a lease if the United States decides not to lease the land within the offer (*e.g.*, *Udall v. Tallman*, 380 U.S. 1 (1965); *Duesing v. Udall*, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966)), it is also clear that if the United States does lease land, the first qualified applicant has a preference right to a lease which cannot be abused by leasing the land to another in violation of the statute and regulations. *E.g.*, *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955).

Usually, problems in determining whether an offeror was the first qualified offeror for a parcel of land can be resolved on facts shown by the official records, particularly the showings of the applicant. Thus, where an offer is not accompanied with essential showings under the regulations it is apparent from the record that the offer must be re-

jected. There is no factual dispute involved, only a legal conclusion to be drawn from the facts in the record. The case before us, however, is different from the usual case because the BLM decision rested upon asserted facts stated in a protest. Basic due process concepts of fairness should have been followed by BLM here. At the very minimum, appellant should first have been afforded the opportunity to respond to such allegations and to rebut the facts stated in the protest before BLM rejected the offer. *Cf. Stickelman v. United States*, 563 F. 2d 413 (9th Cir. 1977).

BLM's error in this case is now rendered harmless because it is true, as BLM's counsel has indicated, that this appeal process has afforded appellant an opportunity to present information to rebut the facts alleged in the protest, and he has attempted to do so by submitting affidavits. It is also true, as appellant contends, that the protestant and Government's counsel have raised issues in addition to that decided by the decision below. These go to the viability of appellant's offer, however, and appellant has had opportunity to address those issues in the briefs filed with this Board and has done so. Were there a clear dispute on basic facts determinative of the legal issues posed therefrom, we would order a fact-finding hearing in this case before an administrative law judge pursuant to 43 CFR 4.415. However, in view of the sworn statements submitted by appellant and others concerning the arrangement with Sprinkle, we see no

basic fundamental factual dispute, only minor factual discrepancies. The main dispute is over the legal significance of the stated arrangement. Thus, we believe the present record affords an adequate predicate for our determination of the crucial issues raised by the appeal.³

[3] The fundamental question, upon which the other issues rest, is whether Sprinkle had an interest in the offer and lease to be issued as prescribed in regulation 43 CFR 3100.0-5(b). As defined therein, an "interest" covers a broad range of rights in an offer or lease, including "[a]ny claim or any prospective or future claim to an advantage or benefit from a lease." See n.2. It is the protestant's and BLM's position that the affidavits submitted by appellant on appeal referring to Sprinkle's "right of first refusal" establish that Sprinkle did have such an interest in the lease. Appellant has attempted to explain away the use of this language in the affidavits by referring to other language therein to show there was no enforceable agreement with Sprinkle whereby the offer had to be assigned by appellant to Sprinkle.

³ We note that appellant has not submitted anything that would indicate that a hearing in this case might be productive of a different result. As will be indicated *infra*, he has not endeavored to show what was intended by the language used in the affidavits of "right of first refusal." Furthermore, he has not denied that Sprinkle paid the filing fees for himself and others. This fact, unrefuted, strongly supports an inference that Sprinkle had more than a mere hope or expectation to purchase a winning lease since the normal expectation is that a person would not pay filing fees as a gratuity, but would as a consideration for a benefit to be obtained.

Appellant contends no enforceable contract existed between Sprinkle and appellant which would give Sprinkle any right or interest in the lease. He contends that many Departmental decisions require that there be an enforceable contractual right before a third person is deemed to have an interest in a lease offer. The cases cited involve relationships between oil and gas lease services and offerors where the written agreements between them permitted the offeror to sell the lease to the service at the offeror's option. The question was whether the services had an interest. It has been held that unless the contract provided that the offeror must sell to the service, the service did not have an interest. See, e.g., *Kelley Everette*, 41 IBLA 155 (1979); *Jack Mask*, 41 IBLA 147 (1979), and cases cited therein. In those cases there was no asserted "right of first refusal" in the service company. There were definite written agreements specifying the various rights of the parties between themselves. There was a clear option in the offeror, but not in the filing service company. These cases are clearly distinguishable from the instant case. Here, apparently, we have no specific written contract. Appellant has asserted that there existed only an oral understanding.

The fact that an agreement or understanding between the parties is oral makes no difference in considering whether there has been a violation of the regulations. Under 43

CFR 3102.7, if there are other parties interested in the offer separate statements must be signed by them and the offeror "setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written." If the oral agreement would give a person "a claim or any prospective or future claim to an advantage or benefit from a lease," there would be an "interest" in the lease as defined by 43 CFR 3100.0-5 (b). The regulation uses the word "claim." This connotes something less than a right which may be successfully enforced in the courts. For example, if a party to an agreement asserts there is no enforceable contract because he could raise a statute of frauds defense in the courts, this does not change his status under this regulation nor under 43 CFR 3112.5-2, which pertains to multiple filings. The party still has a "claim" to an advantage or benefit from a lease, and cannot by a "bootstrap" argument of a possible technical legal defense avoid the consequence of the clear purpose of the regulations to have such interests disclosed and to forbid multiple filings by parties in the same drawings who have such interests. Compare *Foote Mineral Co.*, 34 IBLA 285, 85 I.D. 171 (1978) (presently on appeal in the courts), where it was held, *inter alia*, that the United States may assert a claim and determine the underlying obligation for royalties, even though a defense (in that case, the statute of limita-

tions) against collection of some of the royalties could be asserted in court proceedings.⁴

Thus, the important determination to be made is whether Sprinkle had a "claim" to an advantage or benefit from a lease, and not whether he could successfully enforce the agreement in a court.

[4] Appellant has requested that we consider all of the statements in the affidavits submitted to support his position and not take one statement out of context. We have examined all of the affidavits in connection with appellant's contentions and have carefully considered the statements therein in their entire context. Despite appellant's shifting position in trying to explain away the use of the term "right of first refusal," all the information submitted tends to show that Sprinkle and appellant had an oral understanding or agreement which could come within the definition of an "interest" in the lease.

In Sprinkle's affidavit he states he handles the filing of the entry cards for appellant as well as other mem-

bers of his family and other friends and members of "our family." He then states:

I do not have with them nor do they have with me any prior arrangements as to the sale of any oil and gas leases that they may win.

I have verbally committed to make an offer and I have been assured that my offer would receive early consideration as to its adequacy. My wife, Mary, has authority to act in my behalf.

The latter statement takes away much of the import of the first statement above quoted. Sprinkle has promised to make an offer. Clearly it was appellant's and Sprinkle's understanding that Sprinkle would offer to buy any lease in the drawing which appellant would win, and that "early consideration as to its adequacy" would be given by the offeror.

In appellant's affidavit he states that his father explained to him that Sprinkle would handle the "mechanics of the filing" if appellant desired to participate in the oil and gas lease drawings as other family members had done with Sprinkle's help. Appellant states further:

He explained that I could do so by signing entry cards and giving them to Mr. Sprinkle. Mr. Sprinkle asked for the right of first refusal to purchase the lease. I could sell it to him if I wanted to, but I did not have to. I was perfectly free to sell it to whomever I wanted.

Later in the affidavit he states that he in no way intended to give the private investigator the impression that he was filing on behalf of Sprinkle or that he has been "entering the lottery for Mr. Joe Sprinkle."

⁴ In a different context, in a case involving a conspiracy to acquire patents of desert land under laws limiting the acreage an individual could acquire, it was argued that an oral, undisclosed understanding between desert land entrymen and others would not be a legally enforceable contract. *Reed v. Morton*, 480 F. 2d 634, 641 (9th Cir. 1973), *cert. denied*, 414 U.S. 1064. It was held that there was, nevertheless, sufficient proof of a scheme or conspiracy which year violated the laws. In specifically addressing the argument, the court stated:

"But secret 'arrangements' and 'understandings,' like more formal contracts to pass title to desert land grants after patents, undermine the Interior Department's power and duty to enforce the restrictions on the recipients of the government's bounty." *Id.*

The affidavit by appellant's father, D. W. Enevoldsen is basically of the same import. The most relevant portions of his affidavit read:

For many years I have made applications for oil and gas leases in the Federal Simultaneous Filings. I first became aware of the filings through relatives of mine who are relatives of Joe and Mary Sprinkle. I and other members of my family contacted them to determine if we were eligible to participate in the filings. We were informed that if we would execute the entry cards, the other details would be handled for us by Joe and Mary Sprinkle. The only request that they made of us was that if any of us won, we would let them make an offer and give them the right of first refusal.

With regard to his conversation with the private investigator he stated:

He [the investigator] said, "You are signing cards for Joe Sprinkle," and I said "No, you are putting words in my mouth." I asked him if this was the way that he talked to my son. He kept saying, "Is it true you and your son are signing for Joe Sprinkle?" I kept repeating, "We sign the entry cards for ourselves and we are the only people who have an interest in the leases and we can sell to whomever we want." He kept using phrases such as "But you do sign cards for Joe Sprinkle" and "You are doing this for Joe Sprinkle." I kept telling him that he was misinformed and finally I became rather irritated and told him if he wanted some more information, he could talk to Joe Sprinkle or anyone he wanted, but I did not want to talk to him anymore.

Nine other affidavits were submitted by relatives or friends. They are identical and state:

I was at no time nor am I now obligated to transfer any interest to anyone

in any oil and gas lease that I have won or may win as a result of any simultaneous drawing conducted by the Bureau of Land Management.

Joseph Sprinkle advises me and handles the filing of my application. I have agreed verbally that in the event I am successful, he will have the right of first refusal to purchase the lease. He has agreed to assist me in selling the lease in the event he does not purchase it.

I, at all times, have and have had the sole right to sell to whomever and at whatever price I desire and no one has or has had any right to any portion of any lease I have applied for.

The arrangement or understanding of these nine affiants with Sprinkle appears to be similar to that of appellant.

Appellant contends that, at most, his arrangement with Sprinkle could give rise merely to a "hope or expectation" in Sprinkle and not an "interest" in the lease, and that by decisions of this Board in such circumstances the offeror is the sole party in interest and there is no violation of the regulations. *E.g., Virginia L. Jones*, 34 IBLA 188 (1978); *D. E. Pack*, 30 IBLA 230 (1977); *Harry L. Matthews*, 29 IBLA 240 (1977); *R. M. Barton*, 4 IBLA 229 (1972); *John V. Steffens*, 74 I.D. 46 (1967). In none of these cases, however, was there an agreement that the offeror gave the agent filing the cards a "right of first refusal." They are all distinguishable from the situation here.

Although the affiants used the term "right of first refusal," appellant now says there was no prior agreement of a "right of first refusal" vested in Sprinkle. He con-

tends that appellant did not use the phrase in its legal or technical sense because qualifying language negates such an intent, specifically, his statement that "I could sell it to him if I wanted to, but I did not have to. I was perfectly free to sell it to whomever I wanted * * *."

We do not agree that this statement coupled with all the information in the affidavits establishes that Sprinkle had no claim to an advantage or benefit from the lease. Appellant's excuse that he is a lay person and would not understand technical terms is not persuasive here. Apparently the affidavits were prepared with the help of an attorney, or at least, they were reviewed by an attorney in submitting them as proof of the arrangement between the parties.

Appellant points to court cases which use "right of first refusal" in a technical sense to mean that the person having the right would have the right to meet any bona fide offer of a third party at the same price and on the same terms and conditions as those in the offer by the third person, if the person giving the right decided to sell. *E.g.*, *Turner v. Shirk*, 364 N.E.2d 622 (Ill. App. 1977); *Bennett Veneer Factors, Inc. v. Brewer*, 441 P.2d 128, 134 (Wash. 1968); *Brownies Creek Collieries, Inc. v. Asher Coal Min. Co.*, 417 S.W.2d 249 (Ky. 1967); *Tamura v. De Iuliis*, 281 P.2d 469 (Ore. 1955). Appellant contends that the right of first refusal is not an "option," quoting from *Coastal Bay Golf Club, Inc. v. Holbein*, 231 So.2d 854 (Fla.

1970), at 857, wherein the court stated: "That right is clearly an executory right. It is therefore not an option because an option is an executed contract." Appellant has cited additional cases to the same effect pointing out that the right of first refusal is not a true option because a lessor has the right to retain the property and not to sell to anyone. However, as clearly pointed out in most of these cases cited above, and as expressly quoted by appellant from *Bennett Veneer Factors, Inc. v. Brewer*, *supra* at 132:

In a preemptive right contract, sometimes called a "first refusal" right, there is an agreement containing all essential elements of a contract, the terms of which give to the prospective purchaser the right to buy upon terms established by the seller; *but only if the seller decides to sell*. [Italics by appellant.]

Appellant then contends that the terms of an oral contract must be "clear, satisfactory, and unequivocal." This requirement is stated in cases involving conflicts between the purported parties to the contract. In our situation it suffices if the evidence simply show an arrangement which violated the regulations.

We agree with appellant that the evidence here does not establish that Sprinkle had an option to purchase the lease, within the usual meaning of the word "option" to mean a definite contract whereby the prospective purchaser has a definite right to purchase, if he chooses to do so under agreed upon conditions, rather than the seller having the election to sell. We do not agree, however, that Sprinkle

obtained no right under the oral agreement with appellant. As indicated, appellant contends his statement that he "was perfectly free to sell it to whomever [he] wanted" negates a right of first refusal. Also, appellant states we must look to the term "right of first refusal" in the entire context of the language in the affidavits. This must be true, also, of appellant's other statement. If we were to accept appellant's argument completely that Sprinkle had no rights at all, we would have to ignore the language of "right of first refusal" and say that it had no significance whatsoever. However, it appears that appellant and members of his family and Sprinkle had an understanding that Sprinkle had some right or privilege because he filed the offers for them. It is clear from Sprinkle's affidavit that he was obligated to make an offer to purchase a winning lease from appellant, but that appellant could refuse Sprinkle's offer if he did not want to sell the lease. What is lacking in appellant's submissions is a specific and clear explanation of Sprinkle's right. We cannot accept appellant's assertion that Sprinkle had no right in view of the statement in his affidavit and in the other affidavits which show a pattern whereby Sprinkle would file the offers for appellant and others, if they would give him a right of first refusal.

The affiants' statements do not expressly state that Sprinkle would have the right to match any other offer made by a third person to appellant. However, the language in

the affidavits does not clearly demonstrate that he would not have that right. Such a right is in keeping with the most common legal understanding of the term right of first refusal. The only other possible interpretation which would give some meaning at all to the use of the term is that Sprinkle would be afforded the first opportunity to make an offer to purchase the lease. This is usually called a "first right to buy." See 1A. *Corbin, Contracts* §§ 261, 261A (1963). In both circumstances, the person giving the right does not have to sell. However, if he decides to do so, the party to whom the right was given must be given either the opportunity to refuse to purchase under terms and conditions as a third party would make (right of first refusal), or the opportunity to make the first offer before any other offer would be accepted (first right to buy).

While neither of these rights are the equivalent of an option, they are valuable rights which would preclude the lessor from assigning the lease without first giving Sprinkle either the opportunity to make a first offer to purchase, or to match any offer made to the lessor by a third party.⁵ The fact that the lessor could choose not to sell the lease does

⁵ We appreciate the semantical problems here as the terms do not always have express technical meanings in all factual contexts. The discussion in *Corbin, Contracts, supra*, best explains this. We have used above the most common meanings in light of the factual context presented here. The fact that there may be some ambiguity is caused by appellant's failure to delineate more particularly the arrangement. This should not serve to help his position.

not diminish the right. We find that because Sprinkle had one of these rights he had, at the time offer was filed, an "interest" in the lease offer within the meaning of that term as defined in the regulations to include a prospective claim to an advantage or benefit from a lease. This is far different from an option in the lessor to sell to the agent filing service. In that situation, there is no restraint on alienation of the lease. The lessee may sell to anyone and the agent has no claim against him if he chooses to sell to someone else, without exercising the option to sell to the agent. Under either a right of first refusal or first right to buy discussed above, however, the lessee is restricted in his rights to the lease because he cannot alienate any interest in the lease without complying first with his arrangement with Sprinkle. Thus Sprinkle has an interest in the lease, as defined in the regulations.

In view of the above finding, it is apparent that there was a violation of 43 CFR 3102.7, pertaining to the disclosure of parties interested in the offer and, also, of 43 CFR 3112.5-2, prohibiting multiple filings in a drawing, as Sprinkle filed in the same drawing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as to the rejection of appellant's offer with the modification made herein that appellant should have been given notice and an opportunity to

respond prior to BLM's making the decision.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

FREDERICK FISHMAN,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

APPEALS OF GREGORY LUMBER CO., INC. (ON RECONSIDERATION)

IBCA-1237-12-78

1238-12-78

1239-12-78

1240-12-78

Decided November 23, 1979

Contract Nos. OR090-TS7-8, OR090-TS5-49, OR090-TS6-18, OR090-TS6-60, Bureau of Land Management.

Denied.

Rules of Practice: Appeals: Motions— Rules of Practice: Appeals: Recon- sideration

The appellant's motion for reconsideration provides no reason for overturning the Board's principal decisions which dismissed the subject appeals for lack of jurisdiction. The Board, having found significant current precedents consistent with the view that the effective date of the Contract Disputes Act of 1978 was Mar. 1, 1979, and that claims appealed to the Board prior to that date were not pending then before the contracting officer, finds those precedents controlling without analysis of all matters argued in appellant's brief.

APPEARANCES: Edward F. Canfield,
Attorney at Law, Casey, Scott & Can-

(ON RECONSIDERATION)

November 23, 1979

field, Washington, D.C., for appellant; Lawrence E. Cox, Department Counsel, Portland, Oregon, for Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH*

INTERIOR BOARD OF
CONTRACT APPEAL

Appellant has filed a Motion for Reconsideration of the Board's decision of Sept. 28, 1979, dismissing the subject appeals on the grounds:

1. Important issues of law and precedent concerning statutory construction argued by appellant in its brief were not discussed by the Board in its decision. These cases deserve comment and analysis.

2. In a similar controversy with respect to the meaning of the terms of the statute, another Board was split with a substantial number of judges dissenting. It is respectfully suggested that consideration by the Board en banc should take place.

3. The rule relied upon by the Board is an interim rule. If the rule is later changed, this dismissal will have prejudiced appellant and leave it without recourse under the Contract Disputes Act.

Appellant's first contention that important issues of law and precedent were not discussed by the Board in its decision belies the basic function of the Board to determine factual issues in contractual disputes and to apply existing law to render a decision on the findings of

facts. Although, the question of jurisdiction presented necessarily involves legal questions of statutory interpretation, there exists a significant number of earlier Board of Contract Appeals' decisions and a recent court decision involving the same question of when a claim is "pending then" before the Contracting Officer. Except for dissenting opinions in *Monaco Enterprises, Inc.*, and *Towne Realty, Inc.*, ASBCA 23611 and 23676 (June 6, 1979), 79-2 BCA par. 13,944, the Board decisions are consistent with the view that the language "pending then" as used in the Contract Disputes Act, P.L. 95-563 (41 U.S.C. §§ 601-613 (1976)) means pending before the contracting officer on or after Mar. 1, 1979, the effective date of the Act. This interpretation is confirmed by the Court of Claims in *Troup Bros., Inc. v. United States*, Ct. Cl. Order (Aug. 24, 1979), where the contractor was not permitted to elect to proceed with a direct suit under the Contract Disputes Act because the appeal filed with a Board prior to Mar. 1, 1979, was not pending before the Contracting Officer on the effective date of the Act. We conclude that the availability of significant current precedents involving the specific phrase requiring interpretation is controlling without the need or desirability of analyzing all cases mentioned in appellant's brief.

The suggestion that consideration by the Board en banc should take place is denied with the observation

*Administrative Judge Beryl S. Gilmore who authored the principal opinion is no longer a member of this Board.

that a majority of the Board did join in the Sept. 28, 1979, opinion which dismissed the appeals.

The third contention that the Board rule relied on is only an interim rule subject to change that may prejudice the appellant raises a groundless concern that the Board could modify its rule to change the effective date of the Act as expressed in the Act and as interpreted in various Board and court decisions as discussed in the Board's decision of Sept. 28, 1979.

Conclusion

The Board's principal decision of Sept. 28, 1979, dismissing the subject appeals for want of jurisdiction over the particular claims involved is hereby affirmed.

RUSSELL C. LYNCH,
Administrative Judge.

WE CONCUR:

G. HERBERT PACKWOOD,
Administrative Judge.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

BURGESS MINING AND CONSTRUCTION CORP.

1 IBSMA 293

Decided *November 30, 1979*

Appeal by Burgess Mining and Construction Corp. from a decision by Administrative Law Judge Sheldon L. Shepherd which sustained a notice of violation issued by the Office of Surface Mining Reclamation and Enforcement for failure to remove topsoil and to post perimeter markers clearly (Docket No. NX 9-28-R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Topsoil: Handling

Absent express approval of an alternative plan by a regulatory authority in the manner provided by law, 30 CFR 715.16 requires no less than all the available topsoil to be salvaged.

2. Surface Mining Control and Reclamation Act of 1977: Signs and Markers

While the initial Federal regulatory program requires that the perimeter of the permit area be clearly marked, there is no definition of permit area applicable during such program; therefore, an interpretation of 30 CFR 715.12(c) that is consonant with the spirit and purposes of the Act will be upheld.

3. Surface Mining Control and Reclamation Act of 1977: Signs and Markers

Signs and markers, whenever required, must be durable and easily recognized.

APPEARANCES: W. E. Prescott III, Esq., Birmingham, Alabama, for Burgess Mining and Construction Corp.; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Mark Squillace, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was filed by Burgess Mining and Construction Corp. (Burgess) from the Administrative Law Judge's (ALJ) decision in Docket No. NX 9-28-R which up-

November 30, 1979

held Violation Nos. 1 and 2 of Notice of Violation No. 79-II-16-4, issued to Burgess by the Office of Surface Mining Reclamation and Enforcement (OSM) for its failure (1) to salvage all topsoil on lands to be affected by mining as required by 30 CFR 715.16, and (2) to mark clearly the perimeter of the permit area in accordance with 30 CFR 715-12. The ALJ held that the evidence presented at the hearing was sufficient to uphold the perimeter markers violation and part of the topsoil violation. We believe that the conclusions made by the ALJ were justified under the circumstances and we affirm his decision.

Factual and Procedural Background

On Feb. 1, 1979, William D. Ellis, a reclamation inspection specialist for OSM, inspected the Burgess surface mining operation in Bibb and Shelby Counties, Alabama.¹ Inspector Ellis was accompanied on the inspection by Burgess superintendent James McCoy. As a result of this inspection, Notice of Violation No. 79-II-16-4 was issued to Burgess on Feb. 1, 1979.² Two violations of the Department's interim regulations were specified: (1) the failure of the operator to salvage all topsoil on land to be affected by mining, as required by 30 CFR

715.16; and (2) the failure of the operator to mark clearly the perimeter of the permit area, as required by 30 CFR 715.12. Burgess filed an application for review of the notice on Feb. 26, 1979,³ and a hearing was held before the ALJ on May 10, 1979.

OSM's assertion that Burgess failed to salvage all topsoil was based on the conditions found by the inspector on Feb. 1, 1979, as reported by him in his testimony.⁴ In support of this testimony, OSM introduced Exhibits 3-1, 3-2, 3-7, 3-8, 3-9, and 3-13, photographs of spoil piles partially covering trees. OSM sought to establish that the trees were not removed, and, by inference, that the topsoil was not removed prior to Burgess' disturbance of the area. In addition, OSM introduced Exhibits 3-10, 3-11, and 3-12 (photographs), to show that the upper several inches of the A horizon soil had been scalped from a knoll.

On June 29, 1979, the ALJ issued a written decision which upheld all of Violation No. 2 of the notice (concerning 30 CFR 715.12), but only part of Violation No. 1 (concerning 30 CFR 715.16). With regard to Violation No. 1, the ALJ held that the evidence supported OSM's finding of a failure to salvage topsoil in

¹ This inspection was conducted pursuant to sec. 521 of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. § 1271 (Supp. I 1977), and 30 CFR Part 721 of the Department's interim regulations.

² Notice of Violation No. 79-II-16-4 was issued pursuant to 30 U.S.C. § 1271(a)(3) (Supp. I 1977) and 30 CFR 722.12.

³ Burgess' application for review of the notice was filed pursuant to sec. 525 of the Act, 30 U.S.C. § 1275 (Supp. I 1977).

⁴ The testimony most damaging to Burgess was Ellis' account of his conversation with James McCoy, identified by Ellis as the Burgess "superintendent," in which McCoy allegedly stated that topsoil had not been saved since the end of a United Mine Workers' strike on Mar. 25, 1978 (Tr. 20).

the area as shown in Exhibits 3-10, 3-11, and 3-12, but that the evidence did not support that part of Violation No. 1 pertaining to the areas in which trees were partially covered by spoil piles, because there was no evidence that the spoil was placed there after the effective date of the regulations. Burgess filed its appeal with the Board on Aug. 6, 1979, and its brief in support of the appeal on Sept. 7, 1979. OSM filed a reply brief on Sept. 28, 1979.

Discussion

In its appeal from the ALJ's decision concerning the topsoil violation, Burgess raises two major points. They are, in effect, that its method of handling topsoil was legal and that, even if it was not, there was no competent evidence before the ALJ to establish any illegality. We will treat these in the order stated.

[1] We have held that, absent express prior approval to the contrary by a regulatory authority in the manner provided by law, 30 CFR 715.16 requires no less than all the available topsoil to be salvaged. *Carbon Fuel Co.*, 1 IBSMA 253, 86 I.D. 483 (1979); *Alabama By-Products Corp.*, 1 IBSMA 239, 86 I.D. 446 (1979). Burgess asserts, however, that 30 CFR 715.16 permits less than all available topsoil to be salvaged.⁵

⁵ Burgess completed its brief on Aug. 31, 1979. *Alabama By-Products* was decided on Sept. 14, 1979, and *Carbon Fuel* on Sept. 25, 1979. Consequently, there is no discussion of these cases in that brief and Burgess did not request permission to file a supplemental brief.

Burgess maintains that the language of sec. 715.6(a): "All topsoil *to be salvaged* shall be removed" (italics supplied), leads to the inevitable conclusion that less than absolutely all of the available topsoil need be removed in every case and that circumstances will direct the exact amount that must be salvaged. This suggestion appeals to common sense, but even so, any deviation from the norms set forth in the regulations cannot be based on secrets locked away in the heart or mind of the individual operator. Rather, it must be an exception authorized by law upon the approval of the appropriate regulatory authority. Burgess has done nothing more than nakedly assert that it was not required to salvage all of the topsoil; it has not suggested that its conduct was approved pursuant to any right a regulatory authority might have under law to grant such approval. Burgess cannot exempt itself from the strictures of 30 CFR 715.16 in such an unaided manner. See *Carbon Fuel Co.*, *supra*; *Alabama By-Products Corp.*, *supra*.

The remaining question is whether sufficient evidence was presented to permit the ALJ to find as he did. The rules of procedure that govern this action provide that OSM has the initial burden of going forward to establish a prima facie case, but that the ultimate burden of persuasion shall rest with the applicant for review (Burgess). 43 CFR 4.1171. We have stated that such a prima facie case is made where sufficient evidence is presented to establish essential facts

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which, if uncontradicted, will permit if not compel a finding in favor of OSM. *James Moore*, 1 IBSMA 216, 223, 86 I.D. 369, 373 (1979). The ALJ found a prima facie showing of violation in the testimony of an OSM inspector who recounted statements, damaging to Burgess, made by a Burgess superintendent during the inspection tour. More specifically, the ALJ found that the superintendent said that topsoil had not been saved during a period when the regulation would require such saving (Decision at 3). Burgess maintains on appeal that the inspector was not competent to make declarations that would bind Burgess and that, even if he were competent to do so, he did not in fact make them. The record does not support either contention.

At the very outset of the hearing Burgess indicated its understanding of the need for OSM to establish a prima facie case. It even announced it was so sure that OSM could not make one that it would "make an appropriate motion" at the proper time (Tr. 6). No motion for dismissal was made at the conclusion of OSM's case or at any other time during the hearing. Moreover, although the record is replete with objections made by Burgess to a variety of questions, none was made to the inspector's account of what the superintendent had allegedly told him about Burgess' improper topsoil removal practices. Nor did Burgess, while the inspector was recounting the conversation, request-

voir dire in order to cast doubt upon either the substance of the conversation or the "superintendent's" competency to bind the company by his statements.⁶ There was no cross-examination to serve this purpose, nor did Burgess call any witnesses to challenge either the inspector's account of the conversation or the superintendent's competency to speak for Burgess.⁷ The conclusions made by the ALJ were warranted under the circumstances.

[2] With respect to the perimeter markers violation, the interim regulations provide that "[t]he perimeter of the permit area" shall be clearly marked. 30 CFR 715.12(c). Unfortunately, there is no definition in those regulations of "permit areas."⁸ The statute does define permit area as: "[T]he area of land * * * which * * * shall be covered by the operator's bond as required by sec. 1259 * * *." 30 U.S.C. § 1291(17) (Supp. I 1977). However, sec. 1259 relates to performance bonds and as such is only

⁶ On appeal, Burgess questioned the propriety of the use of such "hearsay" testimony. However, a statement by a representative of a party that constitutes an admission is not hearsay in a Federal proceeding. *See, e.g., Fed. R. Evid.* 801(d). Moreover, an administrative tribunal is not necessarily forbidden to use hearsay evidence. *See* 5 U.S.C. § 556(d) (1976); *Richardson v. Perales*, 402 U.S. 389 (1970); *School Board of Broward County, Florida v. HEW, United States Office of Education*, 525 F.2d 900 (5th Cir. 1976).

⁷ *See, e.g., Midland Enterprises, Inc. v. Notre Dame Fleeting & Towing Service, Inc.* 538 F.2d 1356 (8th Cir. 1976); *Dow Chemical Co. (U.K.) v. S. S. Giovannella D'Amico*, 297 F. Supp. 699 (S.D. N.Y. 1969).

⁸ While "permit area" is defined in the permanent program regulations (30 CFR 701.5, 44 FR 15320 (Mar. 13, 1979)), those regulations are not applicable to enforcement actions during the interim program.

applicable to the permanent regulatory program. See 30 CFR Part 800, 44 FR 15385 (Mar. 13, 1979) (general bonding requirements under the permanent regulatory program). Therefore, the statutory definition of "permit area" is not directly applicable to the interim regulatory program.

The ALJ found that only 75 of the approximately 840 acres covered by Burgess' state permit were to be mined currently and that those were covered by bond (Decision at 3-4). He held that only that bonded area is required to be marked under 30 CFR 715.12(c) (*Id.*). Since "permit area" is not defined for purposes of the interim regulatory program, and the ALJ's holding is consonant with the spirit and purposes of the Act, we are in agreement with that holding.

[3] Marking the perimeter of the permit area, however, is only part of the task. It "shall be *clearly* marked by *durable* and easily *recognized* markers, or by other means approved by the regulatory authority" (italics supplied) (30 CFR 715.12(c)). There is no suggestion

that the regulatory authority approved any other means, and the ALJ found that there was a congeries of various colored flags whose meanings were not clear to anyone (Decision at 4). Although Burgess concedes that no specific question and answer occurred at the hearing to indicate that an explanatory color key was available, it maintains that such was inferentially obtainable from the testimony (Appellant's Brief at 13, 14). The ALJ declined to make such an inference and we decline to say he was incorrect. The ALJ was entirely warranted to hold that the markings did not comply with the clarity and recognition requirements of 30 CFR 715.12(c).

The decision of the Hearings Division is affirmed.

MELVIN J. MIRKIN,
Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

January 30, 1979

FREEDOM OF INFORMATION ACT, APPEAL OF TENNECO*

M-36918

January 30, 1979

**Freedom of Information Act: (Act of
June 5, 1967)**

Denial of request for USGS's estimates of present value of royalties and taxes based on proprietary and confidential information furnished by sources outside Government is legally supportable under exemptions (4) and (9) of Freedom of Information Act (FOIA) since release would be the same as releasing the proprietary and confidential information from which estimates were derived as well as the geological and geophysical data. Further, exemption (5) of FOIA may be used as a basis for protecting presale estimates of value for a tract on which no bids are received since this is part of Departmental's deliberative process of decisionmaking.

Prior Solicitor's Opinions M-36779, Nov. 17, 1969, Appeals of Freeport Sulphur Co. and Texas Gulf Sulphur Co. and M-36841, Nov. 9, 1971, Appeal of Amoco Production Co. are distinguished with respect to the applicability of exemptions (4) and (9) of FOIA to the present value estimates and overruled with respect to the applicability of exemption (5) of FOIA to the presale estimates.

**TO: ASSISTANT SECRETARY—POLICY,
BUDGET AND ADMINISTRATION
FROM: ASSOCIATE SOLICITOR, DIVI-
SION OF GENERAL LAW
SUBJECT: FREEDOM OF INFORMATION
ACT APPEAL OF TENNECO**

By letter of Dec. 5, 1978, counsel for Tenneco Oil Co. has appealed the partial denial of its Freedom of

Information Act (FOIA) request of Oct. 23, 1978, for 21 sets of documents. The Associate Solicitor for Energy and Resources responded to the initial request on Nov. 22, 1978. Most of the requested documents were released. The documents which were withheld and are in issue in this appeal concern items 4, 13, 15 (in part), and 21 of the request.

Item No. 4—This request was for estimates by the United States Geological Survey of the amount of present value of royalties and taxes which would accrue to the United States as a result of its leasing Tract 43-196 or the loss of present value of such receipts if the high bid were rejected.

We are advised that the USGS estimated the present value of royalties and taxes which would accrue to the United States as a result of leasing Tract 43-196 but did not estimate the loss of present values with respect to this tract. Hence only the present value figures are in issue. Cf. 43 CFR 2.13(f).

Item No. 4, with respect to the present value estimates, was withheld under exemptions (4) and (9) of the FOIA.

Exemption (4) to the FOIA, 5 U.S.C. § 552(b)(4) (1976), relates to "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

Exemption (9) to the FOIA, 5 U.S.C. 552(b)(9) (1976), applies to geological and geophysical information and data, including maps, concerning wells.

*Not in chronological order.

With respect to the present value of royalties and taxes which were computed by USGS we are advised that release of such information would make it possible to calculate the oil and gas reserve estimates for those tracts which in turn would compromise proprietary geological and geophysical information that was furnished to USGS from sources outside the Government. Accordingly, it is our judgment that exemptions (4) and (9) may be applied to withhold this type of information since release would be the same as releasing the proprietary information from which it is derived. *See, Pennzoil Co. v. FTC*, 534 F.2d 627 (5th Cir. 1976). Since release of the proprietary information would do substantial harm to the competitive position of the outside sources from which it was obtained and would also inhibit the Government's ability to obtain this type of information in the future, which would have a substantial detrimental effect on the oil and gas leasing program, withholding fits within the criteria of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir 1974).¹

In view of the determination that the information requested by item 4 may properly be withheld on the basis of exemptions (4) and (9) of

FOIA, it is not necessary to consider exemption (5) which may also be applicable to protect the disclosure of this information.

Item No. 13—This concerns two memoranda that were prepared by the Branch of Marine Mineral Leasing, a component of BLM, for BLM consideration in connection with the leasing program. Because these documents were prepared by BLM officials, they qualify as intra-agency memoranda. Further, we are advised that the purpose of these memoranda was to provide advice and recommendations to BLM from one of its specialized components. It follows, therefore, that the opinions and recommendations in these memoranda constitute a part of the BLM's deliberative process of decisionmaking. Accordingly, it is our opinion that applying exemption (5) to these memoranda would be legally supportable. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). The factual materials in these memoranda are contained in the charts attached thereto, which were released. *EPA v. Mink*, 410 U.S. 73 (1973).

Item No. 15—The portion of item 15 that was not released concerns the Geological Survey's estimate of the presale value of Tract 43-184, a tract which received no bids. Since the presale value is internally generated, it qualifies as an intra-agency communication. Further, since the purpose of this value is to serve as a "tool" whereby the Department discharges its responsibilities in administering the awards of oil and gas leases, the presale value also constitutes a

¹ Counsel for Tenneco has argued that Solicitor's opinions, M-36779 of Nov. 17, 1969 and M-36841, of Nov. 9, 1971, indicate that application of exemptions (4) and (9) would not be appropriate in this case. We disagree since those opinions did not concern the specific type of situation, as in the case here, where release of the present values of royalties and taxes would, in effect, reveal proprietary information that had been made available to USGS from sources outside the Government, as well as geologic or geophysical data.

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part of the Department's deliberative process of decisionmaking. Consequently, we conclude that the withholding of the presale value of this tract, where no bid has been received would be within exemption (5). See *NLRB v. Sears, supra* and *Pitman v. Interior*, Civil Action No. 76-F-1022 (D.Colo. 1977). Since the Solicitor's opinion M-36779, was issued prior to the recent cases interpreting exemption (5) such as *NLRB v. Sears, supra* and *Pitman v. Interior, supra*, we do not consider that opinion as requiring release of the Government's prebid values of a tract in the situation presented.

Item No. 21—This concerns information with regard to Tract 43-196, requested in the memorandum of Mar. 29, 1978, by the New Orleans Office of the Bureau of Land Management from the Geological Survey, to be provided over the telephone. The information requested in paragraph A.1 of this memorandum is essentially the same as that requested by Tenneco via Item No. 4 and is withheld for the same reasons. The Geological Survey did not understand what information BLM wanted with regard to paragraph A.2 of this memorandum. It appears that the request was discussed and was modified and redefined over the telephone. We are advised that some information was transmitted by USGS in response to BLM's request but it is not clear what; that the information was taken down by BLM but the sheets of paper containing the information have not

been kept. In any event since the disclosure of the type of information designated in A.2, to the extent it does exist would compromise proprietary geological and geophysical information furnished to USGS from sources outside the government, it is our judgment that exemptions (4) and (9) are applicable for the same reasons discussed with respect to item 4. In view of our determination that exemptions (4) and (9) apply as a basis for withholding the information, it is not necessary to consider exemption (5) which may also be applicable to this information.

In view of the foregoing it is our judgment that the partial denial of this FOIA request is legally supportable.

ALEXIS JACKSON,
Associate Solicitor.

APPROVED:

LEO M. KRULITZ,
Solicitor.

September 25, 1979.

APPEAL OF CARMEL J.
MCINTYRE*

4 AN CAB 24

Decided November 30, 1979

Decision of the Bureau of Land Management AA-6661-B, AA-6661-C.

Affirmed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal

*Not in chronological order.

Board: Appeals: Jurisdiction—Homesteads (Ordinary): Generally

The Board lacks jurisdiction to adjudicate the validity of homestead entries; the Board, rather, adjudicates the effect of ANCSA on such entries.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Res Judicata

The Board will not reverse a prior final decision of the Department where the appellant did not appeal such decision for 15 years, and now seeks reversal of such decision through a new administrative appeal. The principle of finality of administrative action bars consideration of such a new appeal when it involves the same claim of land and the same issues as were the subject of the prior appeal.

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Reconsideration

Where an appellant fails to appeal an administrative decision and, after 15 years, seeks reversal on reconsideration of that decision, and where reconsideration would prejudice third-party interests created in the interim, the Board will not reconsider such appeal.

4. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

The appellant's possible rights to a reconveyance under § 14(c) (1) of ANCSA are not decided by the Board or affected by this decision.

APPEARANCES: Joseph W. Evans, Esq., Birch, Horton, Bittner, Monroe, Pestinger & Anderson, on behalf of the appellant; Edward G. Burton, Esq., Burr, Pease & Kurtz, Inc., on behalf of Eklutna, Inc.; and Russell L. Winner, Esq., Office of the Regional Solicitor, Dept. of the Interior, on behalf of the Bureau of Land Management.

**OPINION BY
ALASKA NATIVE CLAIMS
APPEAL BOARD**

SUMMARY OF APPEALS

The appellant seeks protection under ANCSA from conveyance to Eklutna, Inc., of 22.5 acres of land included in a homestead entry, made by his predecessor in interest, on lands withdrawn, at all times relevant to the entry, for a power-site. The Board rejects the appellant's claims and affirms the decision of the BLM because all the issues raised by Mr. McIntyre in this appeal have already been the subject of final administrative action within the Department of the Interior, or of Departmental decisions which were not appealed in a timely manner.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, the State Director or his delegate is the officer of the Bureau of Land Management, United States Department of the Interior, who is authorized to make decisions on land selection applications involving Native corporations under

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the Alaska Native Claims Settlement Act, subject to appeal to this Board.

FACTUAL BACKGROUND

The decision here appealed approves for conveyance to Eklutna, Inc., pursuant to § 14(a) of ANCSA (85 Stat. 688, 702, 43 U.S.C. § 1613(a) (1976)), certain lands in the Eagle River valley within the Municipality of Anchorage, Alaska. These lands include the following described parcel:

T. 14 N., R. 1 W., Seward Meridian,
Alaska

Sec. 23, S $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$,
SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$ SW
 $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW
 $\frac{1}{4}$

Containing approximately 22.5 acres

The appellant claims as grantee of Durwood Cotton who in turn was the grantee of Robert Lowe, a homestead entryman. The 22.5 acres herein dispute, located entirely in Sec. 23 of T. 14 N., R. 1 W., Seward meridian, are a part of the 160-acre homestead entry, located in Secs. 15, 22, and 23 of the same township. Crucial to the appeal is the history of the land in question in relationship to certain powersite classifications and withdrawals.

In 1925, Power Site Classification Number 107 was issued which included all unsurveyed lands within one-fourth of a mile of Eagle River, affecting, among other townships, Township 14 North, Range 1 West, Seward meridian. In 1950, Power Site Classification Number 399 was published, affecting all unsurveyed

land adjacent to Eagle River at an altitude of less than 500 feet above sea level which was not already reserved by Power Site Classification Number 107. [Secs. 15, 22, and 23 of T. 14 N., R. 1 W., Seward meridian.]

In 1952, the Federal Power Commission issued a Determination Under Sec. 24 of the Federal Power Act (41 Stat. 1063, 1075 (1920) *as amended*, 16 U.S.C. § 818 (1970)), Docketed DA-59-Alaska, BLM, that the value of lands in T. 14 N., R. 1 W., Seward meridian, within one-quarter mile of or at an altitude of 500 feet or less adjacent to Eagle River, would not be injured or destroyed for purposes of power development by location or entry under the public land laws, subject to the provisions of Sec. 24.

In March of 1955, Robert Lowe filed his Notice of Location of Settlement or Occupancy Claim which initially affected lands in Secs. 15 and 22 of T. 14 N., R. 1 W., Seward meridian. He amended the Notice in March or April of 1955 and again on June 30, 1955, including, with the second amendment, the lands in Sec. 23 which are the subject of this appeal.

The appellant alleges, without contradiction, that in October of 1955 certain interpretations were issued by the Bureau of Land Management in Washington, D.C., conforming the powersite reservations to the plat of survey in T. 14 N., R. 1 W.; while these interpretations affected Secs. 15 and 22, they did not deal with lands in Sec. 23.

In February of 1957, Robert Lowe submitted final proof on his homestead entry, covering 160 acres in Secs. 15, 22, and 23 of T. 14 N., R. 1 W. A Notice of Filing of Plat of Survey and Order for opening of public lands was filed in July of 1957 which covered Secs. 15 and 22 but not Sec. 23. In September of 1957, Mr. Lowe filed his Application for Homestead Entry on 160 acres in Secs. 15, 22, and 23 of T. 14 N., R. 1 W. Seward meridian.

The appellant alleges, again without contradiction on the record, that in 1958 and 1959, he built a home on the property which he presently claims. It is unclear from the record what interest Mr. McIntyre held or claimed in the lands at that time. In May of 1959, Mr. Lowe's 160-acre homestead entry was divided by the United States District Court in Alaska in connection with a divorce between Mr. and Mrs. Lowe. Mr. Lowe received 80 acres, including 40 acres, more or less, in Sec. 23, and conveyed his entire 80 acres to Mr. Durwood Cotton, the appellant's grantor. The order of the court appears simply to have divided whatever interest Mr. Lowe had, in the interest of a property settlement, and apparently did not purport to adjudicate the validity of the homestead claim.

Robert Lowe died in 1960, and his homestead application was continued by Jesse M. McGahan, administratrix of his estate.

In February of 1961, Notice of Publication and Entry Allowed/Publication Authorized was issued concerning the entire 160-acre Lowe

homestead entry. However, the Notice was vacated a month later and in April the land was withdrawn for Power Project 2296.

In April of 1962, Power Site Classification Numbers 107 and 399 were conformed to the plat of survey. This was done by plotting the 500-foot contour by photogrammetric methods and then reserving the land in those 2.5 acre aliquot parcels that most nearly conformed to the contour line.

This process of survey conformance left the 22.5 acres now claimed by Mr. McIntyre within the powersite classification.

Mr. McIntyre did not appeal the survey conformance and resulting delineation of the powersite classification boundary nor did his predecessor in interest, Mr. Cotton, or the administratrix of Mr. Lowe. It is unclear from the record whether any of these individuals received notice of the survey conformance or of their appeal rights, if any.

In September of 1962, the BLM state office issued a decision rejecting Mr. Lowe's application to enter and commuted proof under the homestead laws concerning the 22.5 acres here in dispute, because the land fell within Power Site Classification Numbers 107 and 399 as conformed to the plat of survey.

The basis of the original BLM decision was simply that the 22.5 acres within Sec. 23 were, at the time of entry, within the powersite classification. The decision stated, in pertinent part:

Lands which are withdrawn or reserved are not subject to appropriation

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under the public land laws, and unauthorized settlement on withdrawn or reserved lands obtains no rights for the settler. [Citations omitted.]

Consequently, as the records indicate that the following lands:

"S $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 23, T. 14 N., R. 1 W., S.M."

containing 22.5 acres

are within the area withdrawn by Power Site Classifications Numbers 107 and 399 and Power Project 2296, as conformed, the application to enter and commutation final proof as to these lands must be, and hereby are rejected.

The decision was served on Jesse McGahan, administratrix of the estate of Robert Lowe. She appealed to the BLM Division of Appeals and so did Durwood Cotton and the appellant in this appeal, Mr. McIntyre.

Affirming the original BLM decision of September 1962, the Chief, Branch of Land Appeals in a decision rendered Jan. 24, 1963, stated:

It can readily be seen then that the withdrawal of the lands for powersite purposes pursuant to Classifications 107 and 399 considerably predated any settlement or occupancy of the lands by the entryman. The records further show that under Docket No. DA 59 of November 14, 1952, the Federal Power Commission determined that the value of the lands in T. 14 N., R. 1 W., S.M., embraced in Power Classifications 107 and 399, would not be injured or destroyed for purposes of power development by location or entry under the public land laws, subject to the provisions of Section 24 of the Federal Power Act, as amended. However, such lands are not subject to location or entry under the public land laws until an appropriate order is issued by the Bureau of Land Management opening such land to location or entry under

appropriate public land laws. No such order has been issued opening the land in question to entry or location. Accordingly, the lands were not subject to location or entry when the appellant filed his notice of settlement or occupancy claim. [Citations omitted.]

Mr. Cotton and Mr. McIntyre then appealed to the Secretary of the Interior, according to Departmental appeal procedure at that time. The Secretary reaffirmed the decisions below in March of 1964.

CONTENTIONS OF PARTIES

BLM now takes the position that the appellant has no interests protected under ANCSA because the land in dispute was withdrawn under Power Site Classifications 107 and 399 at the time the appellant's predecessor in interest filed his homestead entry, has remained continuously withdrawn ever since, and therefore was never available for entry under the homestead laws. BLM further argues that all issues raised by the appellant are res judicata because the same issues involving the same land were decided in the earlier appeals, or, alternatively, were not appealed timely.

The appellant contends that the land should not have been withdrawn under powersite classifications in 1955, when Robert Lowe filed his initial and amended notices of location. The Federal Power Commission determined in DA-59-Alaska, BLM, in 1952, that the value of the disputed land would not be harmed for power purposes by entries under the public land laws; it then became the obligation of the

Secretary of the Interior to revoke or modify the powersite classifications and open the land to entry. Had he done so, the land would have been open to entry when Mr. Lowe filed his notices of location and, in 1957, submitted his final proof which the appellant assumes would have been adequate. The homestead entry would then have taken precedence over the 1959 Power Site Classification Number 2296, and would be protected under ANCSA from Native selection.

As authority for his insistence on the Secretary's obligation to open the land to entry, the appellant cites *Reeves v. Andrus*, 465 F. Supp. 1065 (D. Alaska 1979), in which the court reversed, in part, a decision of the Interior Board of Land Appeals. (*Henry E. Reeves*, 31 IBLA 242 (1977).)

The Interior Board of Land Appeals had held that the Secretary in his discretion could refuse to restore lands in a powersite classification to entry after the Federal Power Commission determined that the powersite value of the lands would not be harmed by homestead entries. The court, on a motion for partial summary judgment, held that the Secretary, after such a Federal Power Commission determination, was required to restore the lands.

The court relied on the following language of Sec. 24, which was held to be unambiguous and mandatory:

Whenever the Commission shall determine that the value of any lands of the United States * * * classified as power sites, will not be injured or destroyed for the purposes of power devel-

opment by location, entry, or selection under the public-land laws, *the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes * * * as the Commission may determine*, subject to * * * a reservation of the right of the United States * * * to * * * use * * * said lands * * * for the purposes of this subchapter, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation * * * of said lands for said purposes. (*Italics added.*) [*Reeves v. Andrus, supra*, at 1068]

The Department had contended that the Secretary would, upon cancellation of the powersite classification, have withdrawn the land pending settlement of Native land claims, and that the same protective result was reached by maintaining the powersite classification.

The court disagreed, holding "[t]o allow the Secretary to justify a powersite classification because Alaskan Native rights had to be protected would permit the Secretary to make a jumble out of the laws governing the public lands. It would also invite arbitrary use of power by the Secretary and inhibit judicial review of the Secretary's actions. There is no relationship in this case between the Secretary's purpose, the protection of Native rights, and the method used, a powersite classification. Other admitted powers of the Secretary to protect Native rights are irrelevant in the face of the command of 16 U.S.C. § 818." (*Reeves v. Andrus, supra*, at 1071.)

The appellant, Mr. McIntyre, denies that this appeal is res

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judicata, because the issue of the Secretary's obligation to open lands to entry, after the Federal Power Commission determination, was not raised in his prior appeal.

Mr. McIntyre now asks the Board to treat his interest in the Lowe homestead as if the Secretary had, in 1952, opened the disputed land to entry. Alternatively, he asks the Board to refer the appeal to the Secretary for action consistent with the *Reeves* decision.

DECISION

The Board, although sympathetic to Mr. McIntyre's efforts to gain patent, cannot grant the relief sought.

The first reason is jurisdictional. The Board's jurisdiction in this matter is based on regulations contained in 43 CFR 4.1(5), which authorize the Board to decide appeals from decisions of Departmental officials on land selections under ANCSA. It is not within the function or jurisdiction of this Board to decide appeals from decisions on the disposition of land under the public land laws.

[1] The Board lacks jurisdiction to adjudicate the validity of homestead entries; the Board, rather, adjudicates the effect of ANCSA on such entries.

Sec. 22(b) of ANCSA, and regulations in 43 CFR 2650.3-1 provide for the exclusion from conveyance to Native corporations of lawful entries leading to the acquisition of title. Valid homestead entries are specifically protected under § 22 (b).

The validity of the appellant's homestead entry is in dispute insofar as the status of the entry must be adjudicated in order to determine the protection to which it is entitled under ANCSA.

However, it is not necessary for the Board to seek adjudication of the appellant's claimed homestead entry, because the claim has already been adjudicated. As discussed, BLM in 1962 issued a decision rejecting the application of Robert Lowe, Mr. McIntyre's predecessor in interest, for the disputed land. That decision was appealed by the appellant to the Director of BLM and then, according to appeals procedure then current, to the Secretary, both of whom affirmed. Mr. McIntyre did not appeal the Secretary's final decision to the courts.

Accordingly, the next question is whether Mr. McIntyre's present appeal before this Board is barred by the related doctrines of res judicata or collateral estoppel, or by their administrative counterpart, the doctrine of administrative finality. The Board finds that it is.

[2] The Board will not reverse a prior final decision of the Department where the appellant did not appeal such decision for 15 years, and now seeks reversal of such decision through a new administrative appeal. The principle of finality of administrative action bars consideration of such a new appeal when it involves the same claim of

land and the same issues as were the subject of the prior appeal.

The distinction between *res judicata* and collateral estoppel is explained by the Supreme Court as follows:

The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for the purpose." (Citations omitted.) The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. (Citations omitted.)

But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." (Citations omitted.)

Commissioner v. Sunnen, 333 U.S. 591, 597-598 (1948).

Thus, in the rule applied by the courts, *res judicata* operates as a total bar to a subsequent suit between the same parties on all matters which might have been litigated; collateral estoppel prevents

relitigation only of the "particular issue or determinative fact which was necessarily or actually decided by a previous decision of a different cause of action."

BLM argues that the present appeal embodies the same cause of action as the 1964 appeal, in that the appellant again pursues before the Department the same homestead claim, to the same 22.5 acres, as was previously denied. It is arguable that the appellant now asserts a new cause of action, insofar as the term is applicable in administrative proceedings, because the relief sought is not only the ultimate recognition of his homestead rights, but also the immediate exclusion of the disputed lands from the conveyance to Eklutna, Inc., under ANCSA. Regardless of whether the cause of action is considered the same, however, it is clear that the issue of the validity of the appellant's homestead claim was decided in the previous appeal. The appellant argues that the issue of whether or not the Secretary was obligated to open the land to entry, after the Federal Power Commission's 1952 Sec. 24 determination, was not addressed in the 1964 decision. The Board agrees that this issue does not seem to have been in dispute. The Secretary's decision expressly noted the Federal Power Commission's determination, and simply stated without comment that the land was not opened to entry:

The record in this case shows that on November 4, 1952, the Federal Power

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Commission made a determination (No. DA-59, Alaska) under section 24 of the Federal Power Act, as amended (16 U.S.C., 1958 Ed., sec. 818), that the land on the power site classifications could be opened to entry under the public land laws without destroying the value of the land for power development. However, the land was not opened to entry by this Department pursuant to that determination.

The Department obviously concluded that the Secretary was not obligated by the Federal Power Commission determination to open the land to entry. Thus, the issue now presented by the appellant in connection with the *Reeves* decision was resolved without argument by the Secretary in 1964, according to his interpretation of the law at that time.

The appellant argues that the doctrine of *res judicata* is a judicial rule exclusively, and that it is not properly applied in administrative proceedings. The Board cannot agree.

The courts, on occasion, apply the doctrines of *res judicata* and collateral estoppel to bar litigation, before the court, of causes or issues previously litigated and decided in administrative proceedings.

In a suit for breach of an employment contract, the court declined to apply collateral estoppel on an issue previously decided in an unemployment compensation proceeding because of the disparity in amounts claimed in the two actions, the fact that the employee had no legal counsel and did not appear at the compensation hearing, and

similar reasons of fairness. However, the court noted:

The majority of courts at one time rejected the application of collateral estoppel or *res judicata* to administrative decisions. In recent years, however, these doctrines have gained increasing recognition in administrative law. (Citations omitted.)

Lewis v. International Business Machines Corp., 393 F. Supp. 305, 307 (D. Oregon 1974).

The Department has consistently applied *res judicata* and collateral estoppel in its quasi-judicial administrative proceedings. Refusing to reconsider an earlier rejection of a homestead application, the Interior Board of Land Appeals stated:

A request to reconsider a final decision of the Department regarding rejection of applications for homestead entry is properly rejected in the absence of a showing of extraordinary circumstances. * * * In the absence of compelling legal and equitable reasons for reconsideration, the principle of *res judicata* and its counterpart, finality of administrative action, will bar consideration of a new appeal arising from a later proceeding involving the same claim and the same issues.

Dallas C. Qualman, 36 IBLA 119, 121 (1978). See also *Pekka K. Merikallio*, 30 IBLA 157 (1977); *Ben Cohen*, 21 IBLA 330, 331-32 (1975); *United States v. Blythe*, 16 IBLA 94, 101 (1974); *Eldon L. Smith*, 5 IBLA 330, 79 I.D. 149, 153 (1972).

This Board has ruled in *Appeal of State of Alaska*, 3 ANCAB 11, 18, 19 (1978) [VLS 77-11]:

A prior decision of the Department will not be overturned by this Board where the claimant has failed to prosecute an

appeal from such decision and in essence acquiesced to the decision for a prolonged period of time. In this regard both the courts and the Department have previously so ruled:

"*Gabbs Exploration Co. v. Udall*, 315 F.2d 37, 41:

"Here neither plaintiff nor its predecessors in interest took timely action to have the wrong righted, and plaintiff cannot complain of the Secretary's failure to reopen the case. It is significant also that in all the cases cited to us in which a prior decision was reopened the longest period elapsing before reconsideration was three years.

"*Union Oil Co. of California et al*, 71 ID 169, 181, the Department held:

"When, as here, the administrative officer has acted within his jurisdiction and a judicial review of such action has not been sought on a timely basis, the principles of estoppel, laches and *res judicata* are merged in the doctrine of finality of administrative action and are operative to bar appellant's claim for relief."

The appellant argues that, in view of the *Reeves* decision, the Board should disregard, or apply "flexibly", the doctrines of *res judicata* and collateral estoppel, and should review and reverse the Department's 1964 decision rejecting his homestead claim. BLM responds that the Board lacks jurisdiction to review decisions of the Secretary, citing for support two decisions of this Board and one decision of the Interior Board of Land Appeals. (*Appeal of Wisenak, Inc.*, 1 ANCAB 157, 83 I.D. 496 (1976) [NG 75-1]; *Appeal of State of Alaska*, 3 ANCAB 285 (1979) [RLS 79-2]; *City of Kotzebue*, 26 IBLA 264, 83 I.D. 313 (1976). The Board does not consider these cases to be in point.

All three decisions held that appeals boards in the Department's Office of Hearings and Appeals lacked authority to review decisions of the Secretary. In all three cases, the decisions in question were decisions to withdraw public lands made by the Secretary in the exercise of statutory authority.

The decision presently in question is an appellate decision made by the Secretary in his quasi-judicial capacity. In 1964, the present Office of Hearings and Appeals did not exist, and the Secretary was exercising essentially the same function now performed by appeals boards of the Department.

The Office of Hearings and Appeals, comprising administrative law judges and appeals boards, is now an authorized representative of the Secretary for the purpose of hearing and determining appeals within the Department, as fully and finally as might the Secretary. (43 CFR 4.1 (1978).) Appeals boards have the power to review and reconsider their own decisions, in appropriate circumstances. (43 CFR 4.21 (c) (1978).) The appellant cites *United States v. Frank W. Winegar*, 16 IBLA 112, 178-179, 81 I.D. 370 (1974), for the proposition that administrative boards may also review and overrule prior decisions of the Secretary.

The Interior Board of Land Appeals in *Winegar* reviewed and overruled *Freeman v. Summers*, 52 L.D. 201 (1927), a published Departmental decision issued by the Secretary. In so doing, the Board reversed a long-standing Departmental position on the requirement

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of discovery of a valuable mineral deposit in connection with oil shale claims. This reversal was based on the conclusion reached after lengthy analysis, that *Freeman* was clearly contrary to the mining law. The Board stated, as a rule of practice,

Departmental precedent will be overruled where it is shown: 1) that it is contrary to the law as interpreted by the courts and this Department, and 2) it would result in the disposition of public lands to those not entitled to receive them.

Freeman v. Summers, 52 L.D. 201 (1927), is overruled.

United States v. Frank W. Winegar, *supra*, 371.

BLM seeks to avoid the impact of *Winegar* by characterizing this decision as "concerned with the standards for reversing a prior precedent; * * * not concerned in any way with the standards for reconsideration of a prior final decision." (BLM's Response Brief, 16.) The Board cannot accept BLM's interpretation of *Winegar*.

Despite Interior Board of Land Appeals' reference to "Departmental precedent," it is clear that in *Winegar* that Board did, in fact, overrule a prior final decision of the Secretary, which had over many years been given precedential effect in the Department's interpretation of the mining laws in oil shale cases.

However, the circumstances in *Winegar* must be distinguished from those in the present appeal. In *Winegar*, the Department, through Interior Board of Land Appeals, changed its established interpretation of the mining law with regard

to oil shale claims. Having announced the new position in *Winegar*, they simultaneously overruled their prior interpretation from *Freeman*, the previously precedential case. No issues of res judicata or administrative finality were involved, since there was no identity or parties or subject matter.

While *Freeman* was overruled and replaced by *Winegar* as Departmental precedent, *Winegar* was not applied retroactively to change the disposition of *Freeman* or any other previously decided appeal.

[3] Where an appellant fails to appeal an administrative decision of the Department to the courts and then seeks, after 15 years, to have that decision reversed through a new appeal involving the same parties and the same lands, and where third-party interests have been created in the interim consistent with the prior decision, the interest of the Department and the public in administrative finality must override the appellant's interest in retroactive application of a new precedent, and the Board will not review the prior decision in connection with consideration of a new appeal.

The only question remaining is whether the Board should reconsider the Department's 1964 decision, as distinguished from reviewing that decision in a new appeal. Regulations in 43 CFR 4.21(c) (1978) provide:

Unless otherwise provided by regulation, reconsideration of a decision may be granted only in extraordinary circumstances where, in the judgment of the

Director or an Appeals Board, sufficient reason appears therefor.

Four factors deter the Board from reconsideration. First, the above-quoted language refers to decisions of the Director of the Office of Hearings and Appeals, or to an appeals board. There is no provision for an appeals board to reconsider a decision of the Secretary.

Second, the appellant has failed to demonstrate the existence of extraordinary circumstances. His arguments in favor of granting the homestead application were made in connection with the 1964 decision.

The only new "circumstance" is issuance of the decision in *Reeves* contrary to the Department's position on § 24 of the Federal Power Act. The appellant did not appeal the 1964 decision rejecting his homestead claim, and now seeks to benefit from a judicial interpretation of the law in unrelated litigation. The Department has consistently denied requests for reconsideration by appellants who failed to appeal timely to the courts. (*Pekka K. Merikallio, supra; Gabbs Exploration, supra.*)

Third, the appellant's reliance on *Reeves* apparently assumes that, had the Secretary opened the land to entry after the Federal Power Commission's determination, his predecessor in interest would unquestionably have obtained a vested title to the homestead entry. This is too speculative. The Board cannot conclude, 15 years after the fact, that if the land had been opened to

entry, the appellant's predecessor would necessarily have successfully pursued his homestead entry.

Fourth, third-party interests have intervened and should not now be disturbed. Even if the Secretary was obligated to open lands to entry, the land was not made available and could not at any relevant time have been validly entered. Subsequently, additional power withdrawals for the benefit of the Municipality of Anchorage have attached to the land, as have selections by Eklutna, Inc.

[3] Where an appellant fails to appeal an administrative decision and, after 15 years, seeks reversal on reconsideration of that decision, and where reconsideration would prejudice third-party interests created in the interim, the Board will not reconsider such appeal.

Sec. 14(c)(1) of ANCSA provides that, upon receipt of patent, a village corporation "shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence."

[4] This decision in no way affects whatever right the appellant may have to use and occupy the land he claims, and to receive patent to the land, pursuant to § 14(c)(1). This Board does not decide the question of whether the appellant is entitled to a reconveyance pursuant to § 14(c) or any question as to what Mr. McIntyre must receive if it is determined that he has rights under § 14(c).

December 4, 1979

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

JOSEPH A. BALDWIN,
Administrative Judge.

WHITE WINTER COALS, INC.

1 IBSMA 305

Decided *December 4, 1979*

Appeal by White Winter Coals, Inc., from a July 5, 1979, decision by Administrative Law Judge David Torbett in Docket Nos. NX 9-34-R and NX 9-35-R sustaining a cessation order issued for mining without a permit, a notice of violation for an alleged violation of the requirement to pass surface drainage from the permit area through a sedimentation pond, and a cessation order issued for failure to abate the conditions listed in the notice of violation.

Affirmed in part, reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Appeals: Effect of

Although, when a matter is appealed to the Board, OSM cannot take further action in the matter except to advise the Board whether the requested relief should or should not be granted, OSM can at any time move the Board to take what OSM feels is appropriate action.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders—

Surface Mining Control and Reclamation Act of 1977: Environmental Harm—Surface Mining Control and Reclamation Act of 1977: Public Health and Safety

A cessation order is not properly issued under sec. 521(a)(2) of the Act when there is no suggestion in the record that the cited violation was creating an imminent danger to public health or safety or was causing or could reasonably be expected to cause significant, imminent environmental harm.

3. Surface Mining Control and Reclamation Act of 1977: Hearings

Any objection to the location of a minesite review hearing must be made before or at the time of the minesite hearing.

4. Surface Mining Control and Reclamation Act of 1977: Abatement

A refusal to grant an extension of time for abatement is not necessarily an abuse of discretion when the request for an extension was made after the abatement time had expired.

5. Surface Mining Control and Reclamation Act of 1977: Variances—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

Any exemption from the requirements of 30 CFR 715.17(a), concerning sedimentation ponds, must be sought from the appropriate regulatory authority.

APPEARANCES: Jerry Shattuck, Esq., Clinton, Tennessee, for White Winter Coals, Inc.; Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., and Charles Gault, Esq., Office of the Field Solicitor, Knoxville,

Tennessee, both for the Office of Surface Mining Reclamation and Enforcement.

*OPINION BY INTERIOR
BOARD OF SURFACE
MINING AND
RECLAMATION APPEALS*

White Winter Coals, Inc. (White Winter), has sought review of the decision of Administrative Law Judge (ALJ) David Torbett sustaining Cessation Orders No. 79-II-12-3 and 79-II-12-5 and Violation 1 of Notice of Violation No. 79-II-12-4 issued to White Winter by the Office of Surface Mining Reclamation and Enforcement (OSM), under the provisions of secs. 521(a)(2) and (a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).¹

Although we disagree with the ALJ's conclusion that Cessation Order No. 79-II-12-3 was properly issued, we agree with his findings as to Violation 1 of Notice of Violation No. 79-II-12-4 and that portion of Cessation Order No. 79-II-12-5 issued for failure to abate Violation 1 of the Notice. We therefore reverse his decision in part and affirm it in part.

Background

On Feb. 14, 1979, three inspectors from OSM inspected White Winter's surface coal mine in Claiborne County, Tennessee. This mine

was opened in 1977 pursuant to a State mining permit. As a result of the inspection OSM issued to White Winter Cessation Order No. 79-II-12-3 for mining without a current State permit in violation of sec. 502(a) of the Act, 30 U.S.C. § 1252(a), and Notice of Violation No. 79-II-12-4, listing two violations of the initial regulatory program regulations. Violation 1 alleged failure to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds before it left the permit area in violation of 30 CFR 715.17 and Violation 2 charged failure to retain all overburden and spoil material on the solid portion of the existing bench in violation of 30 CFR 715.14. White Winter was given until March 7 to abate the two violations listed in the notice.

During a March 8 follow-up inspection, the inspectors found that the two violations cited had not been corrected, and, in accordance with sec. 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3), issued Cessation Order No. 79-II-12-5 for failure to abate the violations.

On March 15 a minesite hearing was held in Norris, Tennessee. Although no one from White Winter attended the meeting, a letter received from Tom N. Shattuck, the owner and operator of the mine, was made part of the hearing record. The hearing officer upheld the issuance of the cessation order.²

On March 19 White Winter filed applications for review of both ces-

¹30 U.S.C. § 1271(a)(2), (a)(3) (Supp. I 1977). The Act can be found at 30 U.S.C. §§ 1201-1328 (Supp. I 1977). All further citations to the Act are to the 1977 Supplement to the United States Code.

² Minesite review report, Exhibit 4 to Appellant's brief.

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sation orders and of the notice of violation. A hearing was held on June 21 before an ALJ. At the close of that hearing, the ALJ rendered a decision from the bench upholding the cessation order for mining without a permit and those parts of the notice of violation and second cessation order relating to failure to pass all surface drainage through a sedimentation pond. He vacated that portion of the notice of violation that alleged improper spoil placement. This oral decision was confirmed in writing on July 5.³

White Winter filed a timely notice of appeal of this decision on August 8 and filed its opening brief on September 6. Following the granting of a request for an extension of time, OSM filed its reply brief on October 5. On October 12 White Winter filed a request for oral argument. That request was granted on October 23 and the oral argument was held on November 20.

Issues on Appeal

The following issues raised by this appeal will be addressed:

(1) Whether OSM can vacate a cessation order after it has been appealed to the Board;

(2) If not, whether, on the facts of this case, a cessation order was properly issued for mining without a permit;

(3) Whether the notice of violation for failure to pass all surface drainage through a sedimentation pond was properly issued;

³ In the written confirmation, the ALJ appeared to sustain both cessation orders in their entirety. Decision at 2.

(4) Whether the location of the minesite hearing in this case failed to comply with the requirements of the regulations;

(5) Whether additional abatement time should have been granted to the operator; and

(6) Whether OSM should have granted White Winter an exemption from 30 CFR 715.17(a).

Discussion and Conclusions

[1] On page 2 of its brief, OSM stated that it had vacated Cessation Order No. 79-II-12-3, issued for mining without a permit. As we indicated in *Apache Mining Co.*, 1 IBSMA 14, 85 I.D. 395 (1978), once a matter is appealed to the Board, OSM cannot take further action in the matter except to the extent that it can advise the Board whether the requested relief should or should not be granted. If, however, after a review of the record, OSM feels that an appellant is entitled to the relief requested or makes its own determination that some other relief should be given, it can at any time *move* the Board to grant that relief.⁴

In this case, although OSM determined that the portion of its case against White Winter for mining without a permit should be dismissed, it failed to make a motion for dismissal.⁵ In following *Apache*, *supra*, we find that OSM's at-

⁴ This conclusion does not preclude OSM from taking other action pursuant to 30 U.S.C. § 1271.

⁵ At oral argument, OSM suggested that the Board could dismiss this cessation order. We decline to construe this suggestion as a motion to dismiss.

tempted vacation of the cessation order was ineffective.

[2] Thus we reach the issue of whether a cessation order was properly issued in this case for mining without a valid State permit. It is important to note first that White Winter had been operating under a State permit that was due to expire. Renewal procedures were begun by the company in what would normally have been adequate time to secure a new permit before the old one expired. Because of circumstances beyond the control of White Winter, the permit was not renewed before the expiration date. The company, however, remained subject to other environmental regulations. There is no suggestion in the record that White Winter's operations were creating an imminent danger to public health or safety or were causing or could reasonably be expected to cause significant, imminent environmental harm. Sec. 521 (a) (2) of the Act, 30 U.S.C. § 1271 (a) (2), requires one or both of these conditions as a basis for the issuance of a cessation order.⁶ We therefore hold that Cessation Order No. 79-II-12-3 for mining without a permit was not validly issued. That cessation order is vacated.

The ALJ also sustained Violation 1 of Notice of Violation No. 79-II-12-4 which alleged failure to pass all surface drainage from the disturbed area through a sedimen-

tation pond or series of sedimentation ponds before it left the permit area. On appeal, as before the ALJ, the parties raise factual questions.

43 CFR 4.1171 places the burden of establishing a prima facie case as to the validity of a notice of violation on OSM. Once OSM has established its prima facie case, the operator bears the ultimate burden of persuasion. *See Burgess Mining & Construction Co.*, 1 IBSMA 293, 86 I.D. 656 (1979); *Island Creek Coal Co.*, 1 IBSMA 285, 86 I.D. 623 (1979); *Dean Trucking Co.*, 1 IBSMA 229, 86 I.D. 437 (1979). The ALJ found that the testimony of OSM's inspectors and the photographic exhibits established at least a prima facie case that runoff from one outslope would not pass through a sedimentation pond.⁷ He apparently found unconvincing the testimony of White Winter's president to the effect that all runoff from that outslope drained back into the active pit and from there into sedimentation ponds. Thus, he held that OSM had carried the ultimate burden of persuasion.⁸ We find no compelling reason to disturb that conclusion. Therefore, Violation 1 of Notice of Violation No. 79-II-12-4 is sustained. Likewise, that portion of Cessation Order No. 79-II-12-5 issued for failure to abate this violation is sustained.

[3] White Winter raised several other issues that we think should be addressed. White Winter contends that the minesite hearing on its

⁶ Cessation orders issued under 30 U.S.C. § 1271(a)(2) must be distinguished from those issued under sec. 1271(a)(3). Sec. 1271(a)(3) authorizes the issuance of a cessation order when the violations listed in a notice of violation have not been properly abated, regardless of actual or potential effects on the public or the environment.

⁷ Tr. 179-180.

⁸ Tr. 180: "I think the OSM has carried the ultimate burden of persuasion, which is more than they are required to do."

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cessation order failed to meet the requirement that a hearing should be "at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of public hearing." 30 U.S.C. § 1271(a)(5); 30 CFR 722.15(a). Appellant's first objection to the location of the hearing was made some 4 months after the hearing.⁹ Whatever merits this objection may have had were waived by appellant's failure to object before or at the time of the minesite review.

[4] Appellant also urges that the time given to abate the violations listed in the notice of violation should have been extended because of adverse weather conditions and, in failing to grant an extension when requested to do so, OSM abused its discretion. The record indicates that White Winter did request an extension of time when OSM conducted its follow-up inspection.¹⁰ That inspection, however, occurred after the initial time set for abatement had expired. We are not prepared to offer an opinion on whether it would be an abuse of discretion to deny an extension when the request was timely made and compelling reasons for an extension were advanced. But when the operator waits until after the time for performance has expired to make that request, we are prepared to say that OSM does not abuse its discretion by not granting an extension.

⁹ Tr. 18.

¹⁰ Based on our reading of the record, we disagree with the ALJ's finding that White Winter did not request an extension of time (Tr. 181-182).

[5] Finally, White Winter suggests that the inspector should have granted it the exemption from the sedimentation pond requirement contemplated in 30 CFR 715.17(a). This section allows the regulatory authority to grant exemptions when the drainage area is small and it is shown that ponds are not required to meet the effluent limitations and water quality standards established in the regulations. In this context, the regulatory authority as defined in 30 CFR 700.5 is the state department with primary responsibility for administering the Act during the initial program, not OSM. Thus, we conclude that any relief from this requirement should have been sought from the State.¹¹ See *Alabama By-Products Corp.*, 1 IBSMA 239, 86 I.D. 446 (1979).

Therefore we hold that Cessation Order No. 79-II-12-3 was improperly issued and is vacated and that Violation 1 of Notice of Violation No. 79-II-12-4 and that portion of Cessation Order No. 79-II-12-5 issued for failure to abate violation 1 of Notice of Violation No. 79-II-12-4 were properly issued and are sustained. Judge Torbett's July 5, 1979, decision is thus affirmed in part and reversed in part.

IRALINE G. BARNES,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

¹¹ The ALJ noted that state approval might have led him to vacate the sedimentation pond violation (Tr. 180).

**ADMINISTRATIVE APPEAL OF
THE MORONGO BAND OF
MISSION INDIANS**

V.

**AREA DIRECTOR, SACRAMENTO
AREA OFFICE**

7 IBIA 299

Decided December 13, 1979

Appeal from Area Director's decision disapproving a proposed lease of trust land for outdoor advertising purposes.

Reversed.

1. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

Title I of the Highway Beautification Act, 79 Stat. 1028, which applies to all "public lands or reservations of the United States," does not apply to Indian Reservations.

2. Act of Aug. 15, 1953—Indian Tribes: Generally

Public Law 280, 67 Stat. 588-590, did not grant to states general civil regulatory powers over Indian reservations. Nor could this be accomplished by Departmental regulation, Secretarial Order or other directive.

3. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

California's Outdoor Advertising Act, implementing the Highway Beautification Act, 79 Stat. 1028, may not be applied to non-Indian lessees on the Morongo Indian Reservation.

4. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

The Department's policy established in 1965 of requiring lessees of Indian lands

in California to comply with State standards regulating land use and development can be achieved without subjecting developing tribal governments to the full enforcement powers of the State, viz., through adding appropriate State standards to the provisions of any lease.

APPEARANCES: Stephen V. Quesenberry, Esq., California Indian Legal Services, for appellant; James E. Goodhue, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Riverside, California, for respondent.

*OPINION BY CHIEF
ADMINISTRATIVE JUDGE
HORTON*

*INTERIOR BOARD OF
INDIAN APPEALS*

The appeal decided here involves a claim by the Morongo Band of Mission Indians (appellant) that the Area Director, Bureau of Indian Affairs, Sacramento Area Office (respondent), erred in refusing to approve a lease agreement between the Band and the Naegele Outdoor Advertising Co., Inc., of California, for the purpose of erecting and maintaining outdoor advertising structures on the Morongo Indian Reservation.

The Area Director's decision at issue was rendered Mar. 14, 1978.¹ A notice of appeal was timely filed from this decision by California Indian Legal Services on behalf of appellant on Apr. 17, 1978, pursuant to 25 CFR Part 2. By memorandum dated Mar. 27, 1979, Acting Deputy Commissioner of Indian Affairs

¹ The Area Director's decision affirmed a determination made by the Superintendent, Southern California Agency, BIA, dated Aug. 29, 1977.

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Martin E. Seneca, Jr., referred this appeal to the Board of Indian Appeals for resolution in accordance with the provisions of 25 CFR 2.19.²

In reviewing the decision appealed from and the briefs submitted by the parties, it is clear that resolution of this appeal depends primarily on the answer to the following question: To what extent, if any, does the Highway Beautification Act of 1965, 79 Stat. 1028, 23 U.S.C. § 131 (1976), apply to Indian reservations?

BACKGROUND

The genesis of this appeal can be traced to the struggle of the Morongo Band of Mission Indians to develop economically. This background is detailed in appellant's brief dated July 1, 1978, from which the following summary is adduced:

The Morongo Indian Reservation occupies approximately 32,300 acres of land in Riverside County, California, and is inhabited by nearly 300 members of the Morongo Band of Mission Indians. Because the reservation lies astride a narrow pass

between the San Bernardino and San Jacinto Mountain Ranges, only the few relatively flat acres located in the plain are suitable for economic development. A planning study conducted for the Band in 1972 identified a total of less than 1 square mile of reservation land as suitable for economic development. All of that land lies adjacent to Interstate Highway 10, which is a major east-west artery for travel to and from the metropolitan areas of southern California.

In addition to the Interstate Highway, the reservation is crossed by a main line of the Southern Pacific Railroad, the Colorado River Aqueduct, major oil transmission pipelines, natural gas pipelines, and numerous electrical transmission lines, all of which serve the metropolitan Los Angeles area without any significant benefit to the reservation or its residents.

Despite the reservation's seemingly advantageous location for economic development, its economy is depressed and its population poor. The unemployment rate on the reservation is approximately 50 percent.

For many years a major source of income for the Morongo Band has been derived from outdoor advertising activities on tribal lands adjacent to Interstate Highway 10.³

² This regulation provides in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs shall:

"(1) Render a written decision on the appeal or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

³ In an appraisal report dated Oct. 13, 1977, the Southern California Appraisal Office, BIA, identified outdoor advertising as "the highest and best use of reservation land along interstate 10."

Because the foregoing lands consist of property held in trust by the United States for the benefit of the Morongo Band, any tribal lease of the property for business purposes requires approval by the Secretary of the Interior pursuant to the provisions of 25 U.S.C. § 415 (1976), and regulations found in 25 CFR Part 131. The Bureau has refused to approve the Morongo Band's advertising lease with the Naegele company on grounds that the outdoor advertising proposed in the lease violates requirements of the Highway Beautification Act and California State law promulgated thereunder.⁴

DISCUSSION, FINDINGS AND CONCLUSIONS

Certain preliminary questions are answered before we address the main issue. First, the Field Solicitor (who represents the Area Director on appeal) asserts that it is inappropriate for the Board to entertain this appeal because the issues involved are the subject of litigation in *State of California v. Naegele Outdoor Advertising Co. of California, Inc.*, No. 126069, Superior Court of the State of California, County of Riverside. This is an action brought by the State of California, through its Department

of Transportation, against the Naegele company for violations of California's Outdoor Advertising Act, Bus. & Prof. Code §§ 5200-5486, allegedly committed by the company in advertising activities on the Morongo Reservation.

There are indeed questions of law at issue in the foregoing case which also arise in this administrative proceeding, such as whether the Congress intended the Highway Beautification Act to apply to Indian reservations. The precise issue in the State Court proceeding, however, does not involve the lease dispute now before the Board. In this regard, neither the Morongo Band nor the Department of the Interior is a party to the action. In the absence of any court injunction or Secretarial directive precluding the Board from deciding the subject appeal, there is no legal reason why the Board cannot do so. Further, considerations of policy do not favor the continuation of disputes which are ripe for decision. Here, appellant has been pursuing a final administrative determination from the Department for over 1½ years. For the above reasons, the Board rejects respondent's contention that consideration of this appeal should be deferred or denied.⁵

Subsequent to the Area Director's disapproval of the lease at issue, the Morongo Band entered into an

⁴ The Area Director's decision does not recite specific findings of fact or conclusions of law. In lieu thereof, the Area Director states:

"In view of the Riverside Field Solicitor's Opinion; Secretarial Order of July 9, 1965, 30 F.R. 8722; Solicitor's Opinion dated April 7, 1967, and circumstances surrounding the lease proposal of Naegele Outdoor Advertising Company, I hereby affirm the Superintendent's decision of Aug. 29, 1977."

⁵ The Field Solicitor refers to another California suit, *State of California v. Hadley Fruit Co.*, Civ. No. 106415, Superior Court of California, County of Riverside, as one with a direct bearing on the issues before the Board. Appellant disagrees. The Board is informed that the above case has been settled.

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"agency agreement" with the Naegele Company in March 1978. This agency agreement is explained by appellant in its brief dated July 1, 1978, as follows:

During the pendency of these various appeals, the Business Committee of the Morongo Band, pursuant to the authority vested in it through the Band's enactment of Proposition 4 at its General Election of December 14, 1963, continued to consider the possibility of establishing an outdoor advertising industry on the Morongo Indian Reservation because of its potential for creating employment for Band members and for creating an income for the Morongo Band. After lengthy deliberations, it was decided that the most advantageous and expeditious way for the Band to do so would be for the Band to establish its own outdoor advertising enterprise immediately. Because the Band lacked the necessary technical expertise to do so immediately, the Band engaged an agent to commence and to operate certain aspects of this enterprise for the Band during a period when the Band would acquire its own expertise in the business. The Band has entered into an Agency Agreement with its agent [Naegele Outdoor Advertising Company of California, Inc.] for this purpose.

The Field Solicitor submits that appellant is "attempting to convert the appeal from the refusal to approve the lease into an Interior Board of Indian Appeals' ratification of an agency agreement [summarized above] and the Band's operation of an outdoor advertising sign business." Answer Brief filed June 4, 1979, at 2. Appellant denies this charge and maintains that De-

partmental ratification of the Band's agency agreement with the company is not required. Appellant's Reply Brief filed June 22, 1979, at 1-2.

It is neither necessary nor appropriate for the Board to render an opinion regarding the March 1978 "agency agreement." The Board's jurisdiction in administrative appeals is limited to a review of specific action taken by BIA officials in the performance of their duties under Chapter I of Title 25 of the *Code of Federal Regulations*. 43 CFR 4.350-4.353. To our knowledge, no BIA action has been taken regarding the agency agreement.⁶ If some BIA action has occurred regarding the agreement, it is not reviewable by this forum in the absence of a proper appeal therefrom.

Thus, the sole question to be decided here is whether it was error for the Area Director to disapprove the proposed lease of trust land on the Morongo Indian Reservation to the Naegele company.⁷

⁶ According to the Field Solicitor, "at no time was the so-called agency agreement ever presented to the Superintendent, Southern California Agency, or the Area Director, for approval." Answer Brief at 2.

⁷ The terms of the proposed lease are set forth in a letter to the Morongo Band Tribal Council from the Naegele Company, dated Aug. 10, 1977, which reads as follows:

"Gentlemen:

"Confirming our meeting and proposal to the Morongo Tribal Council on Aug. 8, 1977, we would like to propose the following for your approval.

"1. We would like to lease the North side of sections 10 and 12 and the South side of

(Continued)

The statutory authority which permits the leasing of Indian trust land for such business purposes as outdoor advertising is the Act of Aug. 9, 1955, 69 Stat. 539, *as amended*, 25 U.S.C. § 415 (1976). The Act provides that restricted Indian lands, whether tribally or individually owned, may be leased only with the approval of the Secretary of the Interior. In addition to prescribing the term of years for leases consummated under the Act, the statute provides:

Prior to approval of any lease * * * the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and

(Continued)

section 8 located on Freeway Interstate 10. We will only lease enough ground space to erect single pole signs. Each advertising structure will only have one pole with the ground base approximately thirty six inches in diameter.

"2. At this time, our plans call for fifteen different single pole structures, spaced approximately 1000 ft. apart. As we understand, your sections are one mile long on the freeway side. This will allow us to build five on each of the proposed sections.

"3. In order for Naegele to lease the above mentioned property, the Morongo Indians will have to own the poles for each advertising structure. Naegele will furnish and erect each pole and sell them to the Morongos for one dollar each. We can then lease the top of the pole for a total of \$6,500 per year plus the annual increase as outlined on the attached page. At the end of our lease agreement we will buy back the poles for one dollar each or enter into a new lease at the agreement of both parties.

"4. The annual payment of \$6,500 plus, will be made in annual installments in advance beginning Jan. 1, 1978. The payment schedule above will be established by the fact that we will have approval to start construction on the locations by October 1, 1977.

"5. In the event of future development of Morongo property, we will move our structure, including the pole fifty or one hundred feet or wherever it will not interfere with the development. This will be done at no cost to the Morongo Indians.

"6. The Hadley outdoor advertising signs can remain as far as we are concerned. But

(Continued)

the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject. [Act of June 2, 1970, § 2, 84 Stat. 303.]

The Department's regulations governing the leasing of Indian land are set forth in 25 CFR Part 131. These regulations are primarily aimed at insuring proper economic return to Indian lessors. *See* 25 CFR 131.5.

Based on the authorities incorporated by reference in the Area Director's decision (*see* n.4), it ap-

(Continued)

all other advertising signs will be removed by us as their leases expire with you. The reason for this is, we do not want to create outdoor advertising clutter. We would like to have an exclusive right to lease any and all property that you want to lease for advertising on any road or freeway. This will also allow you to expect and get prompt payment from one advertising company, the 3rd largest outdoor advertising company in the United States.

"7. In the event the state finds a way or passes a law to prevent Naegele from leasing the top of each of your single poles through condemnation or whatever, we will pay you the lease money owed through the day we are forced to take down our signs and poles.

"8. Naegele will maintain all advertising structures, including the poles at no cost to the Morongos. We will also assume all cost for illumination and service for the signs. Naegele will also carry all insurance for liability. We will at all times protect the interest of the Morongo Indians.

"9. We will only build standardized outdoor structures, 14' x 48' with space for extensions, please see photo, or we will not exceed 1,200 sq. ft., which will meet state approval.

"10. We will also need the right of ingress and egress of the premises to erect, place and maintain all advertising signs and structures and any equipment therefore and post, paint or illuminate and maintain advertisements or such structures.

Very Truly Yours
Leon E. Howell
President"

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pears that the Area Director disapproved the proposed lease on grounds that California and Federal laws controlling outdoor advertising along Interstate Highways were not satisfied by the provisions of the lease.

On appeal the Morongo Band has presented a comprehensive attack on the validity of the Area Director's action. Among other things, the Band alleges the following:

1. The Highway Beautification Act does not apply to Indian reservation lands.

2. Neither the Highway Beautification Act, Public Law 280, or any other proper legal authority confers on California power to implement its Outdoor Advertising Act on Indian reservations.

3. The Highway Beautification Act and the California Outdoor Advertising Act do not apply to non-Indian lessees of Indian trust lands.

4. The policy of the Secretary of the Interior to apply state land use standards to leases of Indian trust lands can be accomplished without subjecting the Band to state jurisdiction and enforcement measures.

DOES THE HIGHWAY BEAUTIFICATION ACT APPLY TO INDIAN RESERVATION LANDS?

The Highway Beautification Act of 1965, *as amended*, was enacted by Congress to provide for scenic development and road beautification

of the Federal-aid highway systems. Title I of the Act (23 U.S.C. § 131 (1976)) contains requirements for the control of outdoor advertising. At 23 U.S.C. § 131 (h), the Act provides:

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary [in 1965, the Secretary of Commerce; now the Secretary of Transportation].

[1] In a memorandum opinion to the Commissioner of Indian Affairs dated Apr. 7, 1967, the Associate Solicitor for Indian Affairs concluded that "reservations of the United States" as used in subsec. (h) of 23 U.S.C. § 131 includes Indian reservation.⁸ Upon careful review, we conclude that the Associate Solicitor's opinion does not reflect the state of the law on this subject.

The 1967 opinion relies primarily on the Department's disposition of three cases rendered over 65 years ago concerning rights-of-way across "reservations" for canal and ditch purposes.⁹ At issue was whether the term "reservations" as used in the Act of Mar. 3, 1891, § 18, 26 Stat.

⁸ In his concluding paragraph, the Associate Solicitor states that outdoor advertising on Indian reservation lands is subject "to regulations under the act." The opinion does not address whether outdoor advertising on Indian reservations is subject to both Federal and state regulation.

⁹ 27 L.D. 421 (1898), overruling 14 L.D. 265 (1892); 33 L.D. 563 (1905); and 42 L.D. 595 (1913).

1101, 43 U.S.C. § 946 (1976), includes Indian reservations. The Department ruled in the affirmative and this position was followed by a Federal court in 1914. *United States v. Portneuf-Marsh Valley Irr. Co.*, 205 F.416 (E.D. Ida. 1913), *aff'd*, 213 F.601 (9th Cir. 1914).

As appellant argues on appeal, the Act of Mar. 3, 1891, vests power in the Secretary of the Interior to disapprove a right-of-way grant whenever he determines that approval thereof would be injurious to an Indian reservation.¹⁰ On the other hand, the Highway Beautification Act of 1965, which relies on state action to enforce its standards, *see* 23 U.S.C. § 131(b)-(k) (1976), contains no special protection for Indian interests.

One indication that the Department has not considered the Highway Beautification Act applicable to Indian lands is its own regulatory response to the statute. In December 1970, the Secretary issued regulations invoking and expanding the outdoor advertising standards of the Highway Beautification Act with respect to public lands

managed by the Bureau of Land Management. 43 CFR 2921.0-6. No such regulations have been issued by the Secretary with respect to Indian lands.

That the Highway Beautification Act was not intended to apply to Indian reservations is apparent from the enforcement provisions of the law. Under the Act, states are subject to a 10 percent reduction in Federal highway funds if they fail to regulate outdoor advertising in accordance with national standards. 23 U.S.C. § 131(b). States are authorized to employ their zoning or condemnation powers to achieve compliance with the Act. Sec. 131(d)-131(g); 23 CFR 750.301-308. States may even impose stricter limitations than are found in the Act in controlling outdoor advertising. Sec. 131(k); 23 CFR 750.110, 750.155.

For the above measures to be taken by states on Indian reservations two well-established legal principles are necessarily forsaken: first, that tribally owned Indian reservation land is not subject to state powers of eminent domain, *Minnesota v. United States*, 305 U.S. 382 (1939); *United States v. 10.69 Acres of Land*, 425 F.2d 317 (9th Cir. 1970),¹¹ and second, that states are not authorized to enforce their land use regulations on Indian reservations. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975). *cert. denied*, 429 U.S. 1038 (1977).

¹⁰ The statutory proviso reads in pertinent part: "Provided, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation." 43 U.S.C. § 946 (1976). With respect thereto. *see* 27 L.D. 421, 423-424, 33 L.D. 563, 565 and 42 L.D. 595, 600, *supra*. In *U.S. v. Portneuf-Marsh Valley Irr. Co.*, *supra*, the Federal district court stated:

"It is pointed out that there is no apparent reason why an Indian reservation should not be subject to the grant of a right of way the same as any other reservation, especially in view of the fact that the Executive Department having jurisdiction thereof may determine whether a right of way can be granted without injury to the general purpose of the reservation, and extend or withhold approval accordingly." 205 F. 416, 419.

¹¹ Allotted lands are subject to state condemnation. Act of Mar. 3, 1901, 31 Stat. 1084, 25 U.S.C. § 357 (1976).

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Unquestionably, the Congress, which has plenary authority over Indian affairs, *United States v. Kagama*, 118 U.S. 375 (1886), has the power to subject Indian reservations to the type of state regulation generally authorized in the Highway Beautification Act. However, based on principles enunciated by the Supreme Court in *Williams v. Lee*, 358 U.S. 217 (1959), regarding the limits of state power over Indian affairs, it is the Board's position that absent clear Congressional license to the states to control outdoor advertising on Indian reservations, such an intrusion by the states into "the right of reservation Indians to make their own laws and be ruled by them" is without sanction.

The term "reservations" is one broadly used "to describe any body of land, large or small, which Congress has reserved from sale for any purpose." *United States v. Celestine*, 215 U.S. 278 (1909). It may include military reservations, national forests, national parks, or any other Federally protected reserve.¹² Indian reservations are unique, however, since vital rights are vested in the Indians and tribes

located thereon. Appellant refers to the Buck Act¹³ as a clear example of Congressional recognition that Indian reservations are distinguishable from all other Federal reservations. As originally proposed, this Act would have allowed a state to impose its sales tax, use tax or income tax within "Federal areas," alternatively described as Federal "reservations" in the title of the bill. A series of inquiries from the Department of the Interior eventually led to a clarifying provision in the bill excepting reservation Indians from the coverage of the Buck Act.¹⁴

In the case before us, absence of statutory language expressly including or excluding Indian reservations as territory subject to the Highway Beautification Act renders the term "reservations" as used in sec. 131(h), ambiguous. This ambiguity has been recognized by the Department of Transportation, the Federal agency primarily responsible for national enforcement of the Act. By memorandum dated Dec. 19, 1977, an assistant chief counsel of the Federal Highway Administration furnished the Department of the Interior with a draft proposed amendment to 23 U.S.C. § 131(h) aimed at bringing Indian reservation areas within

¹² In concluding that the phrase "public lands and reservations of the United States" as found in the Act of Mar. 3, 1891, included Indian reservations, the Appeals Court noted in *United States v. Portneuf-Marsh Valley Irr. Co.*, *supra*, that "[a]t the date of that act the Indian reservations were the only considerable reservations of the United States." 213 F. 601, 603.

¹³ Act of July 30, 1947, 61 Stat. 641, 4 U.S.C. §§ 104-110 (1976).

¹⁴ 4 U.S.C. § 109 (1976). See Appellant's opening brief filed July 5, 1978, at 4-7.

certain coverages of the Highway Beautification Act.¹⁵

To our knowledge, the legislative history of 25 U.S.C. § 131 (1976) reveals no reference to Indian reservations whatsoever. However, implicit in statements of the House Public Works Committee regarding the legislation is the recurring theme that enforcement of the Act could effectively be achieved through the zoning and condemnation powers enjoyed by states. House Report No. 1084, 89th Congress, 1st Sess., found in 1965 *U.S. Code Cong. & Adm. News*, pp. 3710-3736.¹⁶ As previously stated, however, we believe these powers may be exercised by states on Indian reservations only when Congress expressly so authorizes. Under the circumstances, we find that the legislative history of the Highway Beautification Act supports the conclusion that Congress did not intend to include Indian reservations within the class of reservations affected thereby.

In ascertaining this intent of Congress, it is instructive that Indian lands are specifically identified in other Acts relating to the Federal-aid highway systems as appropriate. See 23 U.S.C. §§ 101(a), 103(b)(1), 120(a),

120(f), 120(g), 125(c), 203, 208, and 217(c). Congress obviously knew when and how to include language relating to Indian reservations in its Federal highway plan.

Appellant submits that in accordance with recognized canons of construction, doubtful statutory language must be interpreted in favor of the Indians. This is undoubtedly true with respect to Federal statutes dealing with Indians. *Worcester v. Georgia*, 31 U.S. (6 Peters) 214, 261 (1832); *Santa Rosa Band of Indians v. Kings County, supra*; *State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, — U.S. —, 58 L.Ed.2d 740, 758 (1979). Where the Federal statute involved is one of general applicability, such as the Highway Beautification Act, some courts are prone to apply normal rules of construction instead of rules which favor Indians. See *United States v. Allard*, 397 F. Supp. 429 (D. Mont. 1975); cf. *United States v. White*, 508 F.2d 453 (8th Cir. 1974).

In this case, it cannot be said that Indians are similarly affected as the general public if sec. 131(h) is deemed applicable to Indian reservations. Such a ruling would significantly alter the tribal sovereignty possessed by Indian nations. Since states have the authority under the Act to impose standards stricter than in the Act itself, such a ruling could mean economic termination of a tribe such as the Morongo Band whose primary source of income is derived from outdoor advertising. Because of the

¹⁵ See pp. 41-46, Appellant's Attachments to Brief on Appeal, filed July 5, 1978. Among other things, the draft amendment called for a voluntary removal program on Indian reservation lands of nonconforming outdoor advertising signs.

¹⁶ The regulations of the Federal Highway Administration concerning condemnation under the Act specify that they "should not be construed to authorize any additional rights in eminent domain not already existing under State law or under 23 U.S.C. 131(g)." 23 CFR 750.301.

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unique tribal interests at stake here, it is not inappropriate to apply the rules of construction urged by appellant, notwithstanding the general nature of the Act in question. So doing, we are all the more satisfied that Congress did not intend the Highway Beautification Act to apply to Indian reservations.

PUBLIC LAW 280 AND DEPARTMENTAL STANDARDS

[2] The Field Solicitor submits that the California Outdoor Advertising Act may be enforced on Indian reservations by virtue of a Secretarial Order of July 2, 1965, published at 30 FR 8722. This directive (signed by Under Secretary John A. Carver) provides in part:

Pursuant to § 1.4(b), Title 25, Code of Federal Regulations (30 F.R. 7520), the Secretary of the Interior does hereby adopt and make applicable, subject to the conditions hereinafter provided, all of the laws, ordinances, codes, resolutions, rules or other regulations of the State of California, now existing or as they may be amended or enacted in the future, limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States and located within the State of California.

The Field Solicitor points out that the above Secretarial directive

has been construed by a California court as vesting the State with authority to apply its laws to lessees of Indian lands. *County of San Bernardino v. LaMar*, 76 Cal. Rptr. 547 (1969).

In a March 1970 opinion, former Secretary of the Interior Walter J. Hickel clarified the Department's position with respect to the 1965 Secretarial directive and expressly stated that the Department had no intention of following the ruling in *County of San Bernardino, supra*, noting that the United States was not a party to the litigation and had no notice of its pendency.¹⁷ Secretary Hickel stated that, at most, California laws were noticed by the Department as standards for the agency to follow in approving leases of Indian land.

The Secretarial directive of 1965 and 25 CFR 1.4(b) are apparent attempts of the Department to apply or interpret the aims of Congress in its enactment of the Act of Aug. 15, 1953, 67 Stat. 588-590, *as amended*, commonly known as Public Law 280.¹⁸ In 1976, the Supreme Court

¹⁷ Mr. Hickel's opinion appears as appendix A to Appellants' Supplemental Statement in Support of Appeal, filed May 3, 1979. It is an unpublished opinion directed to interested parties in the zoning of lands of the Agua Caliente Indian Reservation in Palm Springs.

¹⁸ The 1965 order contains the following proviso: "Nothing contained in this notice shall be construed in any way to alter or limit the provisions of sections 2(b) and 4(b) and (c) of the Act of August 15, 1953 (67 Stat. 588)." Several commentators have questioned the validity of 25 CFR 1.4 (*see, Public Law 280: The Limits of State Jurisdiction Over*

(Continued)

rendered the definitive decision that Public Law 280 did not grant to states general civil regulatory powers over Indian reservations. *Bryan v. Itasca County*, 426 U.S. 373, 390 (1976). The Court's decision in *Bryan* is consistent with Mr. Hickel's 1970 opinion that the Secretarial directive of 1965 was not a general jurisdictional grant to California to apply its regulatory laws in Indian country. Clearly, only Congress may accomplish such a result.

The Field Solicitor further contends that the California Outdoor Advertising Act is a prohibitory statute and thus comes within the purview of the criminal jurisdiction provisions of Public Law 280. It is the case that California has made any violation of its Act a misdemeanor. *Bus. and Prof. Code*, § 5464.

Appellant submits that under the above theory virtually any state licensing or regulatory law could be converted to a "criminal" law by merely providing that violation thereof constitutes a criminal offense. We agree with appellant that Indian reservations would obviously be subject to wholesale regulation by state legislatures under the above interpretation. Dictum in the Ninth Circuit's decision in *United States v. Marcyes*, 557 F.2d 1361, 1364, (9th Cir. 1977) indicates that such a procedure cannot be counte-

nanced. We so hold here on the basis that the California Outdoor Advertising Act is clearly a regulatory law and does not fall within the criminal jurisdiction provisions of Public Law 280.

REGULATION OF NON-INDIAN LESSEES

[3] The most difficult question in this appeal is whether the proposed lease with the Naegle company would be subject to state regulation if approved by the Department because of the non-Indian character of the enterprise. If so, the Bureau of Indian Affairs should possibly not be faulted for disapproving the lease if it fails to satisfy certain requirements of California's Outdoor Advertising Act.

In *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), the Appeals Court reaffirmed its earlier holding in *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972), that a state possessory interest tax could be imposed on non-Indian lessees of Indian trust land. The Board has carefully evaluated the foregoing decisions and related cases. In our opinion, appellant has correctly distinguished the case at hand from those where courts have permitted state regulation of non-Indian lessees on Indian reservations:

However, *Fort Mojave* and *Agua Caliente* are distinguishable from the situation of the Morongo Band on at least two basic points. First, different state statutes are involved which, if enforced against the non-Indian lessee, will have varying

(Continued)

Reservation Indians, 22 U.C.L.A. L. Rev. 535, 586 (1975), by Goldberg, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev. 1061, 1091 (1974), by Chambers. In *Norvell v. Sangre de Cristo Dev. Co.*, 372 F. Supp. 348 (D.N.M. 1974), 25 CFR 1.4 was declared unconstitutional for lack of congressional authorization.

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degrees of impact on tribal self-government. Assessment of a possessory interest tax on the leasehold interest of a non-Indian lessee is qualitatively different from enforcement of a land use statute (California Outdoor Advertising Act) against the same lessee. Second, a corollary of the first point, is the fact that assessment of a possessory interest tax is not an attempt by the State to exercise "general civil regulatory powers" [*Bryan, supra*, 426 U.S. at 390] over reservation lands.

State laws regulating outdoor advertising, like other state zoning and land use laws, fall within *Bryan's* prohibition against the exercise of general state civil regulatory authority on Indian reservations, absent an express grant of such authority from Congress. Moreover, the assessment of a possessory interest tax on the non-Indian lessee, unlike the regulation of outdoor advertising, is not a regulation of the use of the land and results in less of an intrusion into the areas of retained tribal sovereignty and tribal self-government. [Footnote omitted.]

Appellant's Reply Brief, filed June 20, 1979, at 18.

That the effect of state regulation on tribal sovereignty bears on the validity of a state's jurisdiction is explained in *Williams v. Lee, supra*, and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

Here, we find the Morongo Band has made a persuasive showing, one which by proper accounts should have been attempted by its trustee,¹⁹

¹⁹ Under the authority of the Mission Indian Relief Act of Jan. 12, 1891, 26 Stat. 712, the United States issued a patent on Dec. 14, 1908, declaring that it would hold the lands of the Morongo Indian Reservation "in trust for the sole use and benefit of the said Morongo Band or Village of Indians."

that its self-government would be adversely affected by application of California's Outdoor Advertising Act to its non-Indian lessee.²⁰

EXERCISE OF SECRETARY'S AUTHORITY

[4] Appellant observes that the Department's policy "to require lessees of Indian lands to comply with state *standards* regulating land use and development" as expressed in Secretary Hickel's 1970 opinion, "can be implemented without taking the drastic step of subjecting developing tribal governments to the full enforcement powers of the state." Appellant's Reply Brief at 20. The Band suggests that a reasonable approach would be to include State standards regarding placement, illumination, maintenance, etc., of outdoor advertising structures as provisions of any lease. The Board believes this to be a sound proposal. In undertaking this approach, however, the Bureau of Indian Affairs must insure that its own actions serve to protect tribal sovereignty.²¹ This can be partly accomplished by initially acquiring

²⁰ "[T]ribal use and development of tribal property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life." *Santa Rosa Band of Indians v. Kings County, supra* at 664; see also, *Bryan, supra*, 426 U.S. 388, n. 14.

²¹ That this duty is incumbent on the Bureau of Indian Affairs in acting on proposed leases of Indian lands is addressed in Mr. Chambers' article cited in n. 18.

the Band's consent to the use of State standards.²²

DISPOSITION

In accordance with the above discussion, findings and conclusions, the decision of the Sacramento Area Director dated Mar. 14, 1978, disapproving the proposed lease between the Morongo Band and the Naegele company is vacated. This matter is remanded to the Acting Deputy Commissioner of Indian Affairs with instructions that the Bureau of Indian Affairs seek to effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company consistent with this opinion.

In accordance with the authority delegated the Board under 43 CFR 4.1, this decision is final for the Department.

WM. PHILIP HORTON,
Chief Administrative Judge.

WE CONCUR:

FRANKLIN ARNESS,
Administrative Judge.

MITCHELL J. SABAGH,
Administrative Judge.

²² This procedure is desirable to bring the Secretarial directive of 1965 into compliance with the 1968 amendments of Public Law 280 regarding tribal consent. Act of Apr. 11, 1968, 82 Stat. 78-80, 25 U.S.C §§ 1321-22 (1976). Tribal consent should not be a problem in this case. The Morongo Band has suggested the use of State law as a standard for regulating outdoor advertising on its reservation, and, in addition, the Band has repeatedly expressed its commitment to the general purposes of the Highway Beautification Act. See Appellant's Brief filed May 3, 1979, at 4; Appellant's Brief filed June 24, 1979, at 18-19.

APPEAL OF DOYON, LIMITED

4 ANCAB 50

Decided *December 14, 1979*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-19155-26 (Dec. 5, 1975).

Reversed and remanded.

1. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

Where conditions of exploration and settlement explain the infrequency or limited nature of actual use of a water body for commercial purposes, evidence of private use may be considered to demonstrate susceptibility of commercial use for purposes of determining navigability.

2. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

Historic use of a water body by trappers may be properly considered in determining whether a water body has been used or is susceptible of use as a highway of commerce for purposes of navigability.

3. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

Where pole boats, tunnel boats, and outboard river boats constituted the customary modes of trade and travel on a river and its tributaries, the use of these watercraft may be appropriately considered in determining whether rivers in the area were used or are susceptible of being used as highways of commerce.

4. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

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While recreational use, of itself, may not suffice to meet the susceptibility test for purposes of navigation for title, present use for recreation purposes may be properly considered, as a corroborating factor, in determining susceptibility for use as a highway of commerce.

5. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Impediments to Navigation

Physical impediments to navigation, such as gravel bars, riffles, or occasional log jams, do not, in themselves, make a water body nonnavigable.

6. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

To be navigable, a river must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation.

7. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

When the record shows that, historically, trapping was the primary reason for trade and travel in an area, and where the water body in question was commonly utilized by trappers as a route of trade and travel in boats of the period customarily used to freight supplies, such use will result in a finding that the water body has been used and is susceptible for use as a highway of commerce.

8. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway—Alaska: Navigable Waters: Impediments to Navigation

The presence of physical impediments on a water body will not result in a finding

of nonnavigability when the record shows that the water body has been used and is capable of use as a highway of commerce.

9. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all times.

APPEARANCES: William H. Timme, Esq., and Elizabeth S. Taylor, Esq., on behalf of Doyon, Limited; John W. Burke, Esq., Joyce E. Bamberger, Esq., John M. Allen, Esq., and M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Frederick H. Boness, Esq., James N. Reeves, Esq., and Shelley J. Higgins, Esq., Office of the Attorney General, on behalf of the State of Alaska.

*OPINION BY ALASKA
NATIVE CLAIMS APPEAL
BOARD*

SUMMARY OF APPEAL

The issue involved in this decision is whether the Kandik and Nation Rivers are navigable, within the selection area in question. If navigable, title to the beds of these rivers would have passed to the State of Alaska upon statehood pursuant to the Submerged Lands Act, 43 U.S.C. § 1301-1303, 1311-1315 (1976), and would thus not be available for selection by or conveyance to the Appellant, Doyon, Limited. Following a hearing and

final briefing on the evidence in this appeal, Chief Administrative Law Judge L. K. Luoma issued a Recommended Decision concluding both the Kandik and Nation Rivers were, at the time of statehood, navigable all the way from the Yukon River to the Canadian border, including the portions of the rivers within Doyon's selection area. The Board here affirms that decision. At issue, among other questions, is whether historic use of a river by trappers can be considered as evidence use or susceptibility for use as a highway of commerce; whether historic use of a river by watercraft other than steamboats, such as poling boats, tunnel boats, and river boats can be considered in determining whether a river was used or is susceptible to use as a highway of commerce. The Board rules in the affirmative on both these issues. Also an issue in this appeal, but not a part of the Board's decision at this time, inasmuch as it was previously remanded to BLM, was reservation of certain easements on other lands selected by the appellant.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the fol-

lowing findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, the State Director or his delegate is the officer of the Bureau of Land Management, United States Department of the Interior, who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

PROCEDURAL BACKGROUND

On Jan. 5, 1976, the Appellant, Doyon, Limited, filed a Notice of Appeal from Decision F-19155-26 of the Bureau of Land Management (BLM) alleging that BLM erred in its determination that there were no navigable waters within the land areas selected by the appellant pursuant to ANCSA, *supra*, and, also, in the reservation of certain easements on these selected lands. (The easement issue was remanded to BLM Aug. 23, 1979.)

Basically, the appellant asserted that it filed a lands selection application pursuant to § 12(c)(3) of ANCSA, *supra*, for the surface and subsurface estates of three townships located within the "Kandik Basin" area, excluding the Kandik and Nation Rivers inasmuch as these water bodies were identified by the State of Alaska as being issued to the State upon statehood pursuant to the Submerged Lands Act, *supra*. In the decision on ap-

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peal, however, BLM determined that these two rivers were not navigable waters and were therefore not titled in the State. The acreage contained in the beds of these rivers which lay within the selection areas were thus charged against appellant's entitlement.

By order dated May 10, 1976, the State of Alaska was made a necessary party to this appeal and in doing so the Board commented:

Regarding the State's challenge to the Board's jurisdiction, the Board refers to the following regulations by which it is bound. Regulations in 43 C.F.R. 2650.5-1(b) (1975) require the Secretary to determine the navigability of bodies of water in order to determine whether the beds of such water bodies must be included in lands conveyed to selecting Native corporations. Regulations in 43 C.F.R. 4.901(1975) confer upon the Board jurisdiction over appeals relating to land selections. A decision to convey the bed of a water body to a Native corporation pursuant to a determination of non-navigability under the above-cited regulation is sufficiently adverse to the State's claim of title to the same lands to require the State's designation as a necessary party in this appeal.

On July 26, 1976, the Board amplified its earlier ruling stating:

As defined in Section 3(e) of ANCSA, "Public Lands" means all Federal lands and interests therein located in Alaska except: (not pertinent)" and further by regulations in 43 C.F.R. § 2650.0-5(g) adopted pursuant thereto as "(including the beds of all non-navigable bodies of water), except: (not pertinent)." Therefore, the issue of navigability must be determined to enable a finding to be made whether lands selected are within available "public lands" and further, to determine the effect on total acreage entitle-

ment as provided in 43 C.F.R. § 2650.5-1(b).

The Board therefore, concludes that it is not only authorized, but necessarily must decide issues of navigability of bodies of water located within lands selected by Native Regional Corporations.

At the conclusion of briefing on Oct. 21, 1977, the Board issued the following order:

1. Pursuant to regulations in 43 C.F.R. § 4.911(c) this Board finds that a hearing before an Administrative Law Judge is necessary on the issue of the navigability or nonnavigability of the two rivers which are the subject of this appeal. The Board, therefore, refers said issue to the Hearings Division of the Office of Hearings and Appeals with the request that a full hearing be held for the factual determination of the issue of navigability and that a recommended decision be rendered as a result thereof. Upon receipt of the transcript and the recommended decision, this Board will then make a final determination of the matter.

2. The test of navigability of the two rivers in issue on this appeal shall be, as proposed in briefs of the parties, the test stated in *Holt State Bank, supra*.

3. The burden shall be on the Appellant to establish the navigability of the two rivers in issue on this appeal.

On Apr. 18, 1979, following a conference attended by all parties, the issue of navigability was directed to an Administrative Law Judge for hearing and a recommended decision.

Commencing on Sept. 26, 1978, in Fairbanks, Alaska, a hearing was held before Chief Administrative Law Judge L. K. Luoma with all parties represented by counsel. Following completion of the record, post-hearing briefs were submitted.

On June 1, 1979, Judge Luoma's Recommended Decision was issued. Each party to the appeal was granted time from the receipt of the decision to file exceptions with the Board; however, only the Regional Solicitor's Office, on behalf of BLM, filed exceptions raising as objections the following:

1. The recommended decision fails to recognize that navigability for title purposes is determined by a two-part test.

2. The recommended decision fails to adequately explain and apply the "proximity test."

3. The facts recited in the opinion support the BLM's contention that the recommended decision applied the law erroneously.

The appellant on Sept. 5, 1979, filed its concurrence with the findings and conclusions of the Recommended Decision as well as a response to BLM's exceptions.

BASIS FOR DECISION

The record compiled in this proceeding and now before the Board consists of the BLM case file, the Board's file containing the Notice of Appeal, pleadings, briefs, exhibits, motions and preliminary rulings by the Board; exhibits submitted by the parties and admitted into evidence at the hearings; the hearing transcript; post-trial briefing submitted by the parties; and a Recommended Decision submitted by the Administrative Law Judge to the Board, and exceptions and concurrences thereto by the parties. It is on this record taken as a whole that the Board reaches its decision.

ISSUES

The general issue is whether the Kandik and Nation Rivers are navigable. If the rivers are navigable only in part, the issue becomes whether the rivers are navigable within the selection area. Specifically, if the rivers were navigable within the selection site at the time of statehood, title to the riverbeds thereunder passed to the State of Alaska upon statehood pursuant to the Submerged Lands Act, *supra*, as adopted by § 6(m) of the Alaska Statehood Act, 72 Stat. 339, *as amended*, 48 U.S.C. prec. § 21 note (1976), and would thus not be available for selection by or conveyance to the appellant and should not be charged against the appellant's entitlement.

DECISION

The appellant maintains that the Nation and Kandik Rivers are navigable and unavailable for selection and thus should not be charged against the appellant's acreage entitlement. The State of Alaska concurs with the appellant. The Regional Solicitor's Office, on behalf of BLM, defends BLM's finding of the nonnavigability of the two rivers in issue.

The Administrative Law Judge's Recommended Decision, which is attached as an appendix to this decision, holds that the rivers were navigable and in so deciding makes the following legal conclusion:

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I find that the navigability for title test must be used in determining the nature of the Kandik and Nation Rivers. The issue is ownership of the beds of the Kandik and Nation Rivers for the purpose of determining whether they are public lands properly charged against Doyon's total acreage entitlement under the Alaska Native Claims Settlement Act. If the rivers are navigable then title to their beds is in the State; if, however, the rivers are nonnavigable then their beds are Federally-owned and are subject to conveyance to Doyon. There does not seem to be a clearer case of navigability for title purposes. In addition, the Alaska Native Claims Appeal Board ordered that the applicable test is that expressed in *United States v. Holt State Bank*, *supra*, which was a title navigability case. Finally, Alaskan courts have applied the title navigability test in similar situations. Accordingly, application of the more restrictive navigability for title test is appropriate. [p. 719]

There are essential elements of the navigability for title test. Navigability for title is determined by the natural and ordinary condition of a stream at the time that the State in which the stream is located entered the Union. A watercourse is probably nonnavigable for title purposes if artificial improvements are necessary to make it useful for trade and travel. The presence of rapids, sandbars, shallow waters, and other obstructions making navigation difficult or even impossible in sections, however, does not destroy title navigability so long as the river or part of it is usable or susceptible to use as a highway for commerce for a significant portion of the time. *United States v. [sic] The Montello*, 87 U.S. 430 (1874); *United States v. Utah*, 283 U.S. 64 (1931). The waters must be usable by the "customary modes of trade or travel on water." The essence of the test is that the waterway must be useful as a highway for travel and trade in the local area. Navigability is a factual question tested not by the amount or volume of

commerce carried on a river, but by the extent that the commerce carried relates to the needs of the area it serves. A recent case emphasized that sporadic and short-lived use of a waterway for travel and transportation by local residents for their own purposes and not for hire meets the requirement that a waterway be useful as a highway for commerce. *Utah v. United States*, 403 U.S. 9 (1971). [pp. 719-720]

* * * * *

To be navigable, a body of water must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation. *Proctor v. Sim*, 236 p. 114 ([Wash.] 1925). The Kandik and Nation Rivers are tributaries of the Yukon River. The Yukon was historically the major highway of commerce for the whole of the interior of Alaska and the Kandik and Nation have been the only access of reaching a substantial area north of the Yukon. As such, the two rivers meet the proximity test, *Monroe v. State*, 175 P.2d 759 ([Utah] 1946). [p. 722]

Neither the Kandik nor Nation Rivers have been improved at any time. Accordingly, both in 1959 when Alaska entered the Union and at the present time, the rivers are in their natural and ordinary condition. Although rapids, shallow waters, sweepers, and log jams make navigation difficult on both rivers, the evidence shows that these impediments do not prevent navigation. [p. 722]

* * * * *

Although use of the Kandik and Nation Rivers has been slight in comparison with other rivers in more populated areas, the remote and sparsely settled nature of the area in which the Kandik and Nation Rivers are located is an important consideration. As in *Utah v. United States*, *supra*, carriage of goods on both the Kandik and Nation Rivers has been extremely limited. In fact, the only commerce conducted has been trap-

ping, trading, and the transport of supplies and furs by the few trappers on the river and the supplying of goods and mail to the International Boundary Commission. Nevertheless, despite only limited commerce on the rivers, use of the rivers meet requirements of the Federal test for navigability since the rivers have been used as a highway. [pp. 722-723]

* * * * *

The fact that the rivers are frozen for 7 months of the year and that much of the current mineral exploration of the area is done by use of airplane, does not make the rivers nonnavigable. It is not necessary that navigation continue at all seasons of the year, and a stream does not become nonnavigable even if it has fallen into disuse. *Kemp v. Putnam*, 288 P.2d 837 ([Wash.] 1955). [p. 723]

After review of the entire record in this matter, the Board finds that the Judge made proper findings of facts and conclusions of law, and hereby adopts and incorporates the Recommended Decision set forth in the appendix hereto. Consequently, it is the finding of the Board that title to the riverbeds passed to the State of Alaska upon statehood pursuant to § 6(m) of the Alaska Statehood Act, *supra*, which adopted the Submerged Lands Act, *supra*, and, therefore, the acreage of the beds of the two rivers should not be charged against the appellant's entitlement.

The Board has considered the exceptions taken to the Recommended Decision by the Regional Solicitor's Office, on behalf of BLM, and disagrees. The legal test for navigability was agreed upon by the parties and ordered by the Board on October 21, 1977. This test can be found

in *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926):

The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

In its exceptions, BLM contends that the Recommended Decision fails to analyze adequately this test for navigability. BLM focuses on the Court's statement that streams "are navigable in fact when *they are used, or are susceptible of being used*, in their natural and ordinary condition, as highways for commerce." [Italics added.]

It is BLM's position that this statement requires a two-step inquiry into navigability, in which two different tests are applied in a set sequence. Both tests relate to use of the water body as a highway for commerce: the first test addresses actual historical use for this purpose. If sufficient historical use is not found, then—and only then—may the trier of fact apply the second test, which examines the susceptibility of the water body to use as a highway of commerce.

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BLM relies for this proposition on a statement of the Supreme Court in *United States v. Utah*, 283 U.S. 64, 82 (1931):

The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, *the susceptibility to use as a highway of commerce may still be satisfactorily proved.* (Italics supplied.)

Exceptions of the Bureau of Land Management, p. 2.

The "actual use" test, according to BLM, is historical, while the "susceptibility" test focuses on the physical characteristics of the water body and the likelihood of its future use. Following this approach, BLM contends that the evidence does not show sufficient historic use to support a finding of navigability, and that, invoking the second test, physical characteristics of the rivers likewise do not justify a finding of susceptibility to use.

BLM asserts that Judge Luoma erred in that, finding insufficient evidence to support a finding of navigability under either one of the two tests, he in essence combined the two tests, and used evidence relevant to one test to buttress a finding of navigability under the other.

The Board does not agree with BLM's analysis.

The Court in *United States v. Utah*, *supra*, was not attempting to lay down such a precise, formalistic test for navigability as BLM proposes. The Court in fact simply adopts the tests of navigability set

forth in *United States v. Holt State Bank*, *supra*, and in earlier cases including *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

Referring to its own Master's report on the water bodies in question, the Court in *United States v. Utah*, *supra*, remarks without comment:

The Master finds that on the Grand River, in the 79 miles between Castle Creek and the junction with the Green River, there is a stretch of about three miles * * * in which there are three small rapids, and that, in this stretch, the river is less susceptible of practical navigation for commercial purposes than in the remainder of the river. But the Master finds that, even in this three mile stretch, the river is susceptible of being used for the transportation of lumber rafts, *and that there has been in the past considerable use of the river for this purpose.* [Italics added.]

United States v. Utah, *supra*, 79.

Thus the Master, without adverse comment by the Court, used historical data—the "past considerable use"—to buttress a finding of susceptibility for use.

The Court in *United States v. Utah* rejected the government's contention that historical evidence of actual use, or the absence thereof, was controlling, and considered evidence of susceptibility for use as well. The opinion is permissive in tone, rather than restrictive; the Court broadens, rather than restricts, the scope of evidence which may be considered in determining navigability of a water body.

The Courts in *United States v. Holt State Bank*, *supra*, and numerous other cases have obviously contemplated inquiry into both

historical use and susceptibility for use in determining navigability. However, these approaches are neither sequential nor mutually exclusive. Both define areas of consideration in which evidence can be taken in making the overall factual determination on navigability of a particular water body. As explained in *United States v. Utah, supra*, at 83:

The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

BLM's main disagreement with the Recommended Decision lies with the finding of historic use sufficient to show that both rivers have been used or are susceptible to use as a highway of commerce. The findings related to use are summarized as follows:

Boats capable of carrying commercial loads, *i.e.* such quantities of goods as are necessary on a given trip to produce a profit for the person making the trip, are capable of, and have gone up both rivers from the Yukon to the Canadian border. These are the poling, tunnel and river boats.

Recommended Decision, p. 722.

Those working for the International Boundary Commission were paid to bring mail and supplies up the entire length of the Kandik and up the Nation to Hard Luck Creek. The Nation above Hard Luck Creek to the Canadian border was trapped by men, some of whom have made profits from furs. Until trapping

became unprofitable in the 1940's, the trappers brought supplies up both rivers by boat and brought furs downriver by boat.

Recommended Decision, p. 722.

Although use of the Kandik and Nation Rivers has been slight in comparison with other rivers in more populated areas, the remote and sparsely settled nature of the area in which the Kandik and Nation Rivers are located is an important consideration. As in *Utah v. United States, supra*, carriage of goods on both the Kandik and Nation Rivers has been extremely limited. In fact, the only commerce conducted has been trapping, trading and the transport of supplies and furs by the few trappers on the rivers and the supplying of goods and mail to the International Boundary Commission. Nevertheless, despite only limited commerce on the rivers, use of the rivers meet requirements of the Federal test for navigability since the rivers have been used as a highway.

Recommended Decision, p. 722.

Because of the lack of trails and the rough nature in summer of the land surrounding the Kandik and Nation Rivers, travel by water has been the only feasible means of transport of goods between breakup and the time when the rivers freeze. Although the Kandik and Nation have been used only for intrastate commerce, such a use is acceptable under the navigability for title test. Navigability of a river is not tested by the amount or volume of commerce carried but the extent that the commerce carried relates to the needs of the area it serves. Both the Kandik and Nation are tributaries of the Yukon and even the upper reaches of both rivers are accessible to habitation and transportation routes. The rivers can be used to go someplace, as, for example, those employed by the International Boundary Commission used the Kandik to reach the Canadian boundary and trappers on the Nation used that river to obtain and transport

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furs. In effect, both rivers have been used for commercial travel. Although the rivers are remote and the evidence of travel on them is sparse, commerce carried on the rivers has been sufficient to establish navigability since the commerce which has been shown to exist relates to the needs of the region in which the rivers are located. The question as to the practicability of navigating the rivers for profit must be left to the one who undertakes the enterprise.

Recommended Decision, p. 723.

BLM relies primarily on *United States v. Oregon*, 295 U.S. 1 (1935), to support its argument that "use by a few trappers" does not constitute commercial use and therefore trapping cannot constitute historic use that would clearly establish that a water body has been used or is susceptible of use as "a highway for commerce."

The BLM does not consider the use of small boats by trappers to be "commercial" in nature but has considered it to be "subsistence" use in the typical Alaskan setting. This approach was based primarily upon the authority of *United States v. Oregon* which found comparable use by trappers to be insufficient to support a determination of navigability. Possibly because of *United States v. Oregon* the recommended decision does not squarely face the issue, "Is use of boats by a few trappers 'commercial use' for purposes of navigability?" This is a fundamental legal issue in this case. It cannot be sidestepped.

Exceptions of the Bureau of Land Management, pp. 6-7.

BLM misinterprets the holding of *Oregon, supra*, on this issue. In reviewing the evidence related to trapping, the Court states:

The evidence shows that, at times subsequent to 1890, a large number of animals were trapped in the tule areas, some in fall and spring, but principally in the winter months. *Most of this evidence has no bearing on navigability, for with a few exceptions, the trappers appear to have waded or walked.*

* * * * *

* * * The Special Master found that the boating which took place in the area involved had no commercial aspects *and was of such a character as to be no indication of navigability.* [Italics added.]

295 U.S. at 20-21.

BLM apparently interprets the Court's discussion to represent a finding first, that use of a water body by trappers is insufficient as the basis for finding historic use for purposes of navigability; and second, that there must be evidence of "commercial use" to support a determination of navigability.

The Board disagrees with BLM's analysis. The Master in *Oregon, supra*, found the limited manner of use by trappers was only one of a number of factors which, considered together, resulted in the conclusion of nonnavigability. The Court's discussion of the limited nature of boating in *Oregon* does not support a conclusion that use of boats by trappers, under different circumstances, could not satisfy the requirement of susceptibility for commercial use. The referenced language in *Oregon* does represent an interpretation by the Court that use of a water body must either have some commercial aspects or "be of such a character as to indi-

cate navigability," in other words, be of such a character as to indicate susceptibility for commercial use.

The argument related to the requirement of "commercial use," as opposed to private use was urged by the Federal Government in *United States v. Utah*, 283 U.S. 64, at 67, 68 (1931):

No lake or stream has been declared navigable by this Court unless it appeared from the evidence that the stream or lake had actually supported a substantial waterborne commerce.

* * * * *

The words "commerce" and "useful commerce," as used in cases where navigability was the issue, must be interpreted as meaning the exchange and transportation of goods and a use of travel by the general public for commercial purposes. Personal use without the commercial element does not satisfy the test.

The Court rejected the argument that evidence of private use of a river is not sufficient to demonstrate capability for commercial use.

The Government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved.

United States v. Utah, *supra*, at 82.

[1] The Board affirms Judge Luoma's adoption of the holding in

United States v. Utah, *supra*, (Recommended Decision, p. 718) and finds that where conditions of exploration and settlement explain the infrequency or limited nature of actual use of a water body for commercial purposes, evidence of private use may be considered to demonstrate susceptibility of commercial use for purposes of determining navigability.

Likewise, the point of the discussion concerning trapping in *United States v. Oregon*, *supra*, is not that use by a few trappers cannot constitute historic use that might clearly establish that a water body is susceptible of use as a highway of commerce. The Court simply finds that when the evidence as to the use of the area is unrelated to use of the water body in question, it has no bearing on navigability.

In *Oregon* the evidence showed heavy trapping in the area, but for the most part, the trappers did not make use of the water body in question for trade or travel by boat—they waded or walked. Further, in the *Oregon* case there is indication of population in the immediate vicinity of the water body that suggests there would have been boating activity other than trapping had the lake been navigable:

Numerous witnesses who have lived in the vicinity for many years had never used a boat and had never, or rarely, seen one on the lake.

United States v. Oregon, 295 U.S. 1, 21 (1935).

In the present appeal, the factual basis for the ruling by the Administrative Law Judge, is not,

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as BLM suggests, comparable to the factual basis for the ruling by the Court in *Oregon, supra*. It is undisputed that there are no settlements on either the Kandik or Nation Rivers and that the area was, and remains, undeveloped. Trapping was the primary, if not sole reason for trade or travel on the two rivers. The number of trappers, while small, was reasonable for what the drainage areas of the two river basins could support. (Tr. 99.) Testimony during the hearing, or submitted to the record later, linked the majority of the trappers identified as having used the rivers to the use of boats. (Sixteen of the twenty-one trappers identified as using the Kandik between approximately 1920 and 1940 used boats to freight supplies. Each of the seven trappers identified as having used the Nation used boats to freight supplies. (Tr. 52-56, 717-720, 724-725, *Report of Investigations*, Exhibit A-4, Richard O. Stern, Historian, Alaska Division of Forest, Land, and Water Management, and Charles M. Brown, Historian, U.S. Bureau of Land Management.) The boats used by these trappers included pole boats, tunnel boats, and outboard river boats, capable of carrying 1,000 pounds of freight and commonly used on other rivers in Alaska to freight supplies. (Recommended Decision, p. 718.)

[2] The Board does not contend that the use of a water body by trappers will necessarily result

in a finding of historic use that would clearly establish susceptibility as a highway of commerce. However, the Board does find that historic use of a water body by trappers may be properly considered in determining whether a water body has been used or is susceptible of use as a highway of commerce for purposes of navigability.

BLM further objects to the finding in the Recommended Decision related to mode of travel:

An important element of the *Holt State Bank* test of navigability requires that waters be usable as highways for commerce by the customary mode of trade and travel on water. The Supreme Court recognized in *Holt* that canoes and small row boats constituted important means of communication and transportation in early days throughout much of the west, and therefore, may be considered "commercial" for purposes of determining navigability for title. *United States v. Holt State Bank, supra*, 270 U.S. at 56-57.

Recommended Decision, p. 720.

BLM argues that the Court did not base its decision on the assumption that if canoes and rowboats can be used, a water body meets the "susceptibility" test, and further that *Holt* mentions neither the use of canoes or rowboats.

The Board agrees with BLM's objections as to the reference ruling in the Recommended Decision that "canoes and small rowboats" may be considered commercial for purposes of determining navigability.

The Court, in *Holt, supra*, did not attempt to list specific types or classes of watercraft that the Court would treat as "commercial" for a determination of navigability. The Court did restate an important legal criteria, laid down in *The Daniel Ball, supra*, at 563, against which the factual evidence of each navigability case may be weighed:

[Rivers] are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. [Italics added.]

It is true, as BLM argues, that the Court did not find that "canoes and small rowboats" can be considered "commercial" for purposes of determining navigability for title. However, the Court in *Holt Bank* did find that "navigability does not depend on the particular mode in which such use is or may be had * * * but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce." (*Holt Bank, supra*, at 56). The Court then proceeded to analyze the record before it, and found as evidence of useful commerce that "[e]arly visitors and settlers in that vicinity used the river and lake as a route of travel, employing the small boats of the period for [travel]." [Italics added.] (*Holt Bank, supra*, at 57.)

The evidence in the present appeal, pertaining to watercraft is summarized as follows:

Transportation by water was one of the critical factors enabling the interior of Alaska to be opened to exploration and settlement (Tr. 94, 95, 806). The Yukon River provided the primary artery through Alaska (Tr. 132). * * * Soon after the purchase of Alaska by the United States, steamboat traffic on the Yukon began * * *. The use of steamboats was initially restricted to the Yukon and the Porcupine River, which was the only Yukon tributary on which steamboats could be used, until special light draft steamers were designed for use on the Tanana and Koyukuk Rivers (Tr. 45).

* * * By 1955 the Yukon commercial steamboat traffic has ceased (Exhibit A-2, p. 67).

* * * * *

There has been slow economic development in the Yukon-Charley area because of the absence of overland trails, and the Kandik and Nation basins are still underdeveloped (Tr. 95).

Although the Yukon steamboats carried the bulk of the commercial river traffic, a variety of watercraft has been used historically on the interior waterways.

The Yukon poling boats were adapted from boats used earlier on western rivers. * * * The larger steamboats were not used on the tributaries of the Yukon because there was not enough freight generated on those streams to call for use of these larger boats. Poling boats, however, were used on tributaries of the Yukon. Poling boats were used on a regular basis to serve communities and transport freight, and tunnel boats were used extensively by the Alaska railroad and others (Tr. 135, 138, 145, 170).

Motorboats came into use in Alaska after World War I. * * * Liftable motors were often attached to enable boats to travel over shallows. These boats are in use today and although the draught of the boats are constant, with the engine raised the boats can get over shallow spaces. The boats, accordingly, can be loaded more heavily (Tr. 161, 162).

Recommended Decision, pp. 717-718.

The Court in *The Montello*, 87 U.S. (20 Wall.) 430, 441-442 (1874), stated:

It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. [Italics added.]

The Board, likewise, believes it would be a narrow rule to hold that in Alaska, unless a river was capable of being navigated by steamboat, it could not be treated as a highway capable of supporting commercial usage.

[3] The Board therefore finds that pole boats, tunnel boats, and outboard river boats constituted the customary modes of trade and travel in the tributaries of the Middle-Yukon area, and the use of these watercraft may be appropriately considered in determining whether rivers in this area were used or are susceptible of being used as highways of commerce.

The Recommended Decision notes that the use of the Kandik and Nation Rivers did not begin and end with trapping-related trade and travel.

Jet boats are in common use today and have been for the last 7 to 8 years (Tr.

758). Jet boats are flat-bottomed river boats 20-26 feet in length, approximately 4 feet wide, which are equipped with a 25 to 50 h.p. outboard motor with a jet unit (Tr. 567).

Recommended Decision, p. 718.

Since statehood, there has been recreational use of the Kandik River. BLM's [sic] Navigability Investigation Report on the Kandik and Nation Rivers notes that the Kandik and Nation Rivers are becoming popular recreational rivers.

Recommended Decision, p. 718.

There is testimony in the record of present use both by trappers and others. Melody Grauman, witness for BLM, states:

There's quite a bit of use of boats on the Kandik and Nation by trappers, canoes with engines powered from six to ten horses, hunters, sports hunters from Fairbanks and elsewhere coming up in jet boats, air boats, and they're able to go quite far up the—up the river.

Tr. 116.

Government employees studying the rivers for various land management proposals testified to seeing other parties on the rivers during their trips over the past two years. (Recommended Decision, p. 718.)

The Judge states:

Although standing alone it may not suffice to support a finding of title navigability, use of the rivers by those pursuing a subsistence lifestyle and use of the rivers for recreation corroborate that the rivers are navigable. Hunters and canoeists do not bring their boats to these rivers by road and then use only selected portions of the rivers. Rather, hunters and canoeists get to the upper reaches of both the Kandik and Nation Rivers by way of the Yukon River. Those using the Kandik and Nation for recreation must bring any supplies needed with

them and they must carry out any game caught by boat.

Recommended Decision, p. 723.

[4] In the present case, historical use by trappers is within the living memory of some of the witnesses, and use of the rivers continues, although the purpose is increasingly for recreation rather than trapping. The Board affirms the finding in the Recommended Decision that recreation use, of itself, may not suffice to meet the susceptibility test for purposes of navigation for title. Present use for recreation purposes may be properly considered as a corroborating factor in determining susceptibility for use as a highway of commerce. The Board notes that if the type of watercraft used for recreation is capable of carrying a commercial load, and is commonly used to do so, then use of such watercraft offers some indication that the waterway is capable of being used for the purpose of useful commerce.

The BLM repeatedly expresses concern that the Recommended Decision ignores its considerable evidence as to the physical characteristics of the two rivers and that this evidence proves that the degree of difficulty precludes a finding that the Kandik and Nation are susceptible to use as highways of commerce. In fact, the Recommended Decision does consider the physical impediments to travel on these rivers, but concludes that "the evidence shows that these impediments do not prevent navigation." (Recommended Decision, p. 722.)

BLM contends that the Kandik and Nation Rivers are not navigable because their water levels fluctuate, they are hazardous, and only canoes, lightly loaded, can navigate them, because they are interspersed at various points by gravel bars or log jams. Finally, BLM contends that commercial boats carrying freight for hire have not traveled the rivers.

Recommended Decision, p. 722.

Although rapids, shallow waters, sweepers, and log jams make navigation difficult on both rivers, the evidence shows that these impediments do not prevent navigation.

The presence of gravel bars, riffles, or occasional log jams in themselves do not make the rivers nonnavigable, *United States v. Utah*, *supra*. Neither the Kandik nor the Nation has falls and rarely do obstructions block the channel completely. This is notwithstanding that there was testimony that one may have to pole or line a boat over shallow places. Even in August, a time of very low flow, several inches of water flowed over the gravel bars.

Boats capable of carrying commercial loads, i.e. such quantities of goods as are necessary on a given trip to produce a profit for the person making the trip, are capable of, and have gone up both rivers from the Yukon to the Canadian border.

Recommended Decision, p. 722.

BLM argues that the Judge's reliance on *United States v. Utah*, *supra*, is inappropriate because there was more evidence of historic use in that case before the Court than was established by the evidence in this case. Further, BLM argues the Court based its finding on evidence of physical characteristics rather than historic use, and an analysis of the testimony in this case shows that the Nation and Kandik have much less "capacity" for supporting commercial use than

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the rivers discussed in *Utah, supra*. (Exceptions of the Bureau of Land Management, 7-8).

BLM is correct in stating there was more evidence of use in *Utah, supra*, than in the present case, but the record indicates that there was more population and economic activity in the area of the Green, Colorado and San Juan Rivers than there were or are in the Kandik and Nation area. The Court in *Utah* does analyze the physical characteristics of the water body, as does the Judge in the Recommended Decision in this case. In both cases, the finding is based on actual use.

[W]hile there is testimony that in floods and periods of high water these rivers carry a considerable quantity of logs and driftwood, *the evidence as to actual trips* made by witnesses discloses little danger thereby incurred except in case of paddle-wheel boats. The Master's finding, which *the evidence supports*, is that this condition does not constitute a serious obstacle to navigation. [Italics added.]
283 U.S. 64 at 84.

[5] The Board affirms Judge Luoma's adoption of the holding in *United States v. Utah, supra*, that physical impediments to navigation, such as the presence of gravel bars, riffles, or occasional log jams, do not, in themselves, make a water body nonnavigable.

It is true that the Kandik and Nation are difficult rivers to navigate. It may be that the degree of difficulty evidenced in the record will constitute the outside limit of navigation for useful commerce. However, what the record in this appeal does show is that the rivers were

used, not by a few people, but by—given the isolation and economics of the area—a surprising number of people, in watercraft capable of carrying and actually carrying, commercial-size loads customary to rivers tributary to the Yukon.

The fact that both the Nation and the Kandik are tributaries of the Yukon adds an important dimension to the finding that these rivers are susceptible to being used as highways of commerce. The judge finds:

To be navigable, a body of water must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation, *Proctor v. Sim*, 236 P. 114 (1925). The Kandik and Nation Rivers are tributaries of the Yukon River. The Yukon was historically the major highway of commerce for the whole of the interior of Alaska and the Kandik and Nation have been the only access of reaching a substantial area north of the Yukon. As such, the two rivers meet the proximity test, *Monroe v. State*, 175 P.2d 759 (1946).

Recommended Decision, p. 722.

Although the Recommended Decision discusses the so-called "proximity test" immediately after the finding that both the Kandik and Nation Rivers are navigable, it is apparent from reading the Decision as a whole that the access of the rivers to the Yukon is being treated in conjunction with the further finding of historic use as a highway of commerce. The Board disagrees with BLM's representation that the Recommended Decision treats the proximity test "as an alternative legal test for determining navigabil-

ity which is met solely by the fact that a waterbody flows into another navigable waterbody." (Exceptions of the Bureau of Land Management, 11.)

The Recommended Decision clearly does not rely solely on the location of the Kandik and Nation as tributaries of the Yukon to find navigability, but interweaves location as one of several factors which, taken together, result in a finding of navigability.

[6] Therefore, the Board affirms the finding in the Recommended Decision that to be navigable, a river must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation.

[7] In conclusion, the Board finds that when the record shows that, historically, trapping was the primary reason for trade and travel in an area, and where the water body in question was commonly utilized by trappers as a route of trade and travel in boats of the period customarily used to freight supplies, such use will result in a finding that the water body has been used and is susceptible for use as a highway of commerce.

[8] The Board further finds that the presence of physical impediments on a water body will not result in a finding of nonnavigability when the record shows that the water body has been used and is capable of use as a highway of commerce.

The Board adopts the undisputed finding of the Administrative Law

Judge that neither the Kandik nor Nation Rivers have been improved at any time. Accordingly, both in 1959 when Alaska entered the Union and at the present time, the rivers are in their natural and ordinary condition. (Recommended Decision, p. 722.)

Finally, the Board adopts the finding of the Administrative Law Judge that both the Kandik and Nation Rivers are navigable all the way from the Yukon River to the Canadian border, and therefore the rivers, as they flow through the selection area, are navigable. (Recommended Decision, p. 722.)

The Board recognizes BLM's concern that "the recommended decision sets forth a standard under which it is difficult to imagine any river in Alaska to be nonnavigable." (Exceptions of the Bureau of Land Management, 5.)

The same concern was expressed by appellees in *The Montello*, *supra*, at 437:

If the Fox River is a navigable stream of the United States, it would be impossible to conceive of any body of water that is not or might not become such navigable water.

Just as the *Montello* decision did not result in blanket navigation determinations, neither will the Kandik and Nation decision. The facts of each case will be examined on their merits.

[9] Simply stated, the question of navigability is factual. BLM urges its concern for having a "yardstick" for future navigability determinations in Alaska. The Board is

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sympathetic to this concern. However, it will not undertake to do what the United States Supreme Court has not attempted, *i.e.*, to define in precise, checklist fashion the requirements for navigability of a body of water. Though not a title case, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404 (1940), expresses the position of the Court: "The legal concept of navigability embraces both public and private interests. It is not to be determined by formula which fits every type of stream under all circumstances and at all times."

Consideration of factual determinations made in other cases can no more than assist in the process. *United States v. Utah*, *supra*, at 87:

The Government invites a comparison with the conditions found to exist on the Rio Grande in New Mexico, and the Red River and the Arkansas River, above the mouth of the Grand River, in Oklahoma, which were held to be non-navigable, but the comparison does not aid the Government's contention. Each determination as to navigability must stand on its own facts.

BLM concedes that Judge Luoma summarized the evidence carefully in his Recommended Decision. The Board concurs, and finds in making a factual determination of the navigability of the Kandik and the Nation Rivers that the Recommended Decision applied proper principles of law and that its conclusion is supported by the evidence.

ORDER

Insofar as the Decision of the Bureau of Land Management F-19155-

26 found the Nation and Kandik Rivers, within the selection area in question, to be nonnavigable, such Decision is hereby reversed and remanded to the Bureau of Land Management for action consistent with the finding that the two rivers are navigable.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

JOSEPH A. BALDWIN,
Administrative Judge.

APPENDIX

June 1, 1979

MEMORANDUM

To: Alaska Native Claims Appeal Board
From: Chief Administrative Law Judge
Subject: Appeal of Doyon, Ltd., Administrative Appeal (ANCAB RLS 76-2)

Pursuant to the Board's Order of October 21, 1977, I am forwarding herewith my recommended decision, together with the complete record made in the subject proceedings.

Copies of the recommended decision have been served on all parties, who are allowed 30 days from the receipt thereof to file exceptions with the Board.

L. K. LUOMA

June 1, 1979

Appeal of Doyon, Ltd., from Decision of
Bureau of Land Management #F-
19155-26

ANCAB RLS 76-2

Navigability of Kandik and Nation
Rivers

RECOMMENDED DECISION

Appearances: Elizabeth S. Taylor, Esq.,
Fairbanks, Alaska, for
Appellant;

Shelley Higgins, Esq., Anchorage, Alaska, for the
State of Alaska;

John M. Allen, Esq., and
Frances Neville, Esq.,
Regional Solicitor's Office,
Department of the
Interior, for Appellee.

Before: Chief Administrative Law
Judge Luoma

BACKGROUND

On Dec. 5, 1975, the Bureau of Land Management, Appellee (hereinafter, BLM), issued a decision approving certain lands for interim conveyance to Doyon, Ltd., Appellant (hereinafter, Doyon), pursuant to the provisions of the Alaska Native Claims Settlement Act.¹ This decision stated that there were no navigable water within the areas which had been selected by Doyon. Doyon appealed the navigability issue to the Alaska Native Claims Appeal Board. In an order issued on May 10, 1976, the Alaska Native Claims Appeal Board joined the State of Alaska (hereinafter, the State) as a necessary party in the appeal because a determination of nonnavigability would be adverse to the State's claim of title to the land under the Kandik and Nation Rivers. On Oct. 21, 1977, the Board referred the matter to the Chief Administrative Law Judge for a fact-finding hearing and recommended decision. A hearing was held on Sept. 26, 1978, in Fairbanks, Alaska.

Doyon has selected two parcels of land in the area of the upper Yukon River. Through one of these parcels flows the Kandik River; through the other flows the Nation River (Tr. 11). BLM determined that neither of these rivers was navigable, and accordingly the acreage of those parts of the beds

of the rivers which are located within the selection areas were charged to Doyon, pursuant to 43 CFR 2650.5-1(b).²

Navigability is an issue in this case because the Alaska Statehood Act³ made the Submerged Lands Act applicable to Alaska. The Submerged Lands Act, 43 U.S.C. § 1301 (1976), *et seq.*, generally provides that title to the submerged lands underlying navigable waters passes to the State at the time of statehood. If the Nation and Kandik Rivers are navigable waters, title to their beds would have passed to the State upon statehood and could not be conveyed to Doyon by BLM.

The Nation and Kandik Rivers are tributaries of the Yukon River. Both the Kandik and the Nation have their headwaters in the Olgilvie Mountains which are located in the Yukon Territory, Canada. The mouths of both rivers are on the north bank of the Yukon River in the area between the villages of Eagle and Circle, Alaska. Various witnesses referred to the geographical area in which the Kandik and Nation as well as a portion of the Yukon Rivers flow as the "Yukon-Charley." Accordingly, I will use the term "Yukon-Charley" to refer to the region

¹ 43 CFR 2650.5-1(b) provides, in part:

"Surveys shall take into account the navigability or nonnavigability of bodies of water. The beds of all bodies of water determined by the Secretary to be navigable shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlements under the act. Prior to making his determination as to the navigability of a body of water, the Secretary shall afford the affected regional corporation the opportunity to review the data submitted by the State of Alaska on the question of navigability and to submit its views on the question of navigability. Upon request of a regional corporation or the State of Alaska, the Secretary shall provide in writing the basis upon which his final determination of navigability is made. The beds of all bodies of water not determined to be navigable shall be included in the surveys as public lands, shall be included in the gross area of the surveys, and shall be charged to total acreage entitlements under the act."

² 72 Stat. 339, § 6m.

³ 43 U.S.C. § 1601, *et seq.* (1976).

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in which the Kandik and Nation Rivers are located.

ISSUE

The issue is whether the Kandik and Nation Rivers are navigable in whole or in part. If the rivers are only navigable in part, the issue becomes whether the rivers are navigable within the selection areas (Tr. 9, 74).

Facts

Approximately 7 miles of the Kandik River flows within the selection area located on that river. The selection area is approximately 47 miles upstream from the mouth of the Kandik (Tr. 447, 448). There are approximately 3 miles of the Nation River within the selection area located on that river. The selection area is approximately 35 miles from the mouth of the Nation.

The rugged part of the Ogilvies are in Canada and not along the Kandik or Nation basins. The Nation River tends to flow in a southwest direction and is located against the west side of its basin. The Nation basin, which is generally no wider than 15 to 20 miles, from ridgetop to ridgetop, at its widest point, is a small basin, is very narrow, and is linear in shape. The Nation is a smaller river than the Kandik, has a more narrow channel and meanders more tightly than does the Kandik (Tr. 64). There are only a few major tributaries to the Nation among which Ettrain and Hard Luck Creeks are the largest. Both of these tributaries are less than 20 or 30 miles in length. The Nation is characterized by many shallow areas where log jams form, and the river has a fluctuating water level which is a result of the small watershed. The river is in permafrost country and, as a result, when it rains the water can only percolate down the watershed rather than sink into the soil. There are many obstructions on the river. The river is a sometimes braided, sometimes meandering, stream in its entirety. The river drops between 15 and 20 feet a mile, on the

average, from the headlands to the mouth.

A braided river is a stream which has broken apart into many channels. At any given time there may be water in all the channels, or there may only be water in some or only in one. Where the water flows at any given time, in a braided stream, depends on when the last high water occurred. A meandered stream is one which has a single well-defined channel, which loops back and forth (Tr. 543, 544).

In the lower stream area, and at the mouth, the Nation is braided into many channels. At Hard Luck Creek the stream thread averages approximately 100 to 150 feet in width, yet even here, at some places, the river narrows. Throughout the entire length of the river, in narrow areas against the banks, the water is 4 to 5, perhaps 6 feet deep. These deep areas are separated, however, by gravel bars which often run completely across the river. In August 1978, there were approximately 135 shallow areas downstream of the selection area on the Nation (Tr. 347). Although the river is braided for much of its length, during low summer flow there is normally only one channel carrying water.

From mid-June through freeze-up, depending on whether there has been rain, both rivers are free of ice. The approximate time of freeze-up is early to mid-November. The rate of flow of the Nation River averaged, in June 1978, 5 to 6 miles an hour. In August, the flow was reduced to 1 or 2 miles per hour (Tr. 712-13). The Nation is considered to be a moderately swift stream, and the river bed is generally gravel. The area in which the Nation is located is remote. The mouth of the river is 60 miles downstream from Eagle, which has a relatively small population. Habitation within the Nation basin consists of seasonal occupancy by trappers.

The Kandik is bigger than the Nation and is centrally located in its basin. The maximum width of the Kandik's basin is

about 20 miles, from ridgetop to ridgetop, and the Kandik basin has a rolling mountain character as does the adjacent Nation basin. Where the Kandik enters the Yukon River it has a single mouth and there is a defined channel for a quarter to a half of a mile inland. Above this area, the river becomes a shallow stream. Upstream to the vicinity of Judge Creek, which is about 24 river miles, the Kandik is alternately meandering and braided and the general thread of the stream in this area is 100 to 150 feet in width. Above Judge Creek the river meanders through a short area of open tundra. From Johnson Gorge upstream through the selection area, which is a total of 20 miles, the Kandik is confined on one side or the other of the basin and the river, in this area, has a very defined channel, with deep water. In all, from the mouth of the Kandik to the selection area there were 70 shallow areas in August 1978 (Tr. 398). Above the selection area to Big Sitdown Creek the river meanders and widens. From Big Sitdown Creek which is above the selection area the river gets continually smaller and shallower. In Canada there are just three small streams coming together to form the river channel. Between the selection area and the mouth of the Kandik the elevation drops a total of 500 feet in 37 miles (Tr. 668-71).

That portion of the Kandik which flows through the selection area is deep, is free from gravel bars, and has a uniform bed. The water level of the Kandik which is located within the selection area was too high to measure in June 1978. In August 1978, the Kandik was 4-6 feet deep within the selection area. In June 1978, the water was so deep in that portion of the Nation which flows through the selection area that no flow measurements could be taken. The water of the Nation was .3 of a foot and .6 of a foot respectively, in August 1978, as it flowed over two gravel bars within the selection area on the Nation; however, the river was 3-4 feet deep in the channel through the selection area at the same time.

The Kandik is more stable than the Nation in its flow characteristics, because it has a larger basin. The Kandik, however, reacts in the same fashion to sudden rainfall but peaks of flow may last slightly longer than in the Nation. In June 1978, water was flowing in the Kandik at the rate of 5 miles per hour. In August, the flow was 1 mile per hour (Tr. 712-13). Both streams are clear, and the elevation loss is approximately the same. One person lives on the Kandik year round, at the mouth of the river. Remoteness of the Kandik River is the same as that of the Nation (Tr. 561-73). Circle is located on the Yukon River downstream from where the Kandik enters the Yukon. Circle has a small population.

A sweeper is a tree growing in dirt riverbanks which has been undermined by the action of the current. The river, as it flows, eats away the bank and undermines the ground on which a tree is growing. The tree gradually slants towards, and sometimes into, the creek. Sometimes these undercut trees are horizontal to the river. Often the main channels of both the Kandik and Nation flow under sweepers and there are numerous sweepers on both the Kandik and Nation Rivers (Tr. 62). The danger is that a loaded boat can be carried by the current into sweepers and there is a possibility that the boat can be overturned as a result (Tr. 63). During floods, these sweepers are often pulled out of the banks and the trees are pulled downstream by the current. The trees then lodge on gravel bars, etc., and create log jams. There are numerous log jams on both the Kandik and Nation Rivers. Log jams are considered permanent obstructions in that they often remain in one place for many years (Tr. 515). No river in the interior of Alaska, however, is free from hazards, even the Yukon. Gravel bars, sweepers, and log jams for instance, are common and virtually every Alaskan river has them, although on some Alaskan rivers these hazards may not be as frequent as on the Kandik and Nation (Tr. 464).

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Temperatures in the area where both the Kandik and Nation Rivers are located range from 70 degrees below zero to more than 90 degrees above. The average annual temperature of the region is approximately 20 degrees F. Annual precipitation in the area averages 8 to 12 inches (Tr. 624). More than 50 percent of the precipitation falls as rain during the summer, the remainder of the precipitation is winter sleet and snow. Snow cover in the area lasts approximately 7 months (Tr. 47, 257, 566, 718-19).

In the general vicinity of the Kandik and Nation River basins there generally is a heavy rainfall almost every day during the summer because the general weather pattern in that area produces rainstorms in the afternoon, or at night. These storms, however, might not hit the Kandik or Nation drainage areas and weeks may pass without rain in these particular drainage areas. Conversely, depending on where the storms develop, there may be 3 or 4 days in a row during which the rain falls in the Kandik or Nation basins. Accordingly, given this very local weather situation, there is no predictability of the occurrence of high and low water levels on the subject rivers (Tr. 289).

A flashy stream is one where changes in water flow occur rapidly within a very short time. A very flashy stream is one where peak water flow is three to five times the daily mean average (Tr. 522, 523). In a very flashy river, during periods of extreme low flow, it would be impossible to plan ahead as long as a week in determining when high water peaks will come. Sometimes a traveler can only determine an hour ahead when high water will come (Tr. 699).

Conditions that contribute to the flashiness of a particular stream include a small drainage basin, a steep drainage basin, a drainage basin that is thoroughly impermeable at the surface, such as would be the case in either a thinly soil-covered drainage basin or an area with significant permafrost, and the absence of lakes. The Kandik and Nation basins

meet these conditions. Flashiness, by itself, is not an impediment to navigation (Tr. 687, 709, 710). If there was no rain for a very extended period of time, it is possible that water could cease to flow in the rivers; however, if such were to happen, pools of water would remain. A boat could be floated on these pools for some distance (Tr. 672). During periods of high water significant impediments to navigation result from floating debris and log jams, whereas during periods of low water, the principal impediments are the gravel bars (Tr. 349, 350).

BLM distinguishes between recreational use of rivers and use of a river basin as an area where a subsistence lifestyle is pursued. Recreational use is nonfunctional in an economic sense. A subsistence lifestyle is extremely functional in an economic sense in that it centers on a search for food (Tr. 276). The subsistence lifestyle has been pursued by some in the Kandik and Nation basins since the 1960's. Although few, if any, people lived on either river during the 1950's, others living on the rivers in the 1930's and 1940's, as did the Natives before them, pursued a subsistence lifestyle (Tr. 265-67).

Those living a subsistence lifestyle are very much dependent on the rivers. Anything used to supplement their diet must be brought from Eagle or from Circle. To get supplies to their camps, these people use boats with a motor or they use dogs to pull their supplies or the supplies are lined up the river. Almost all the people pursuing this lifestyle live on a tributary stream or river.

There are two techniques used in lining a boat. One technique is hand lining which requires a 100-foot length of rope. One end of the rope is attached to the bow of a canoe and the other end of the rope is attached to the stern of the canoe. By manipulation of the length of the lines with the stern line being the longer, the boat can be moved upstream. The other technique is to have a dog in harness at a

point on the line that is equivalent to where the man would normally be. Lining a canoe is not difficult (Tr. 251, 252).

The first inhabitants of the Yukon-Charley area were the Han Athabascan Indians. There is a lack of documentation concerning Native use of the area and no comprehensive historical or anthropological study of the Natives has been done (Tr. 82-83, 793). Prior to the arrival of Europeans in the area, the Hans had settled primarily in three or four different villages along the Yukon and the Natives subsisted on the resources available in the region. The Natives fished primarily for salmon in the Yukon during the summer, hunted caribou in the mountains during the fall, hunted various other game throughout the year, and trapped during the winter. The Han traveled extensively for subsistence purposes but remained primarily at the Yukon villages for most of the year. Charley's village was located at the mouth of the Kandik River until 1914 when it was destroyed by a flood (Tr. 48). The number of Han Indians living in the region prior to the arrival of Europeans was less than one thousand. The Natives used birchbark canoes, flatbottomed canoes, longer (30-foot) traveling canoes, very long, narrow hunting canoes with poles, and later, rafts and scows (Tr. 84). The Natives sometimes used skin boats to float down the rivers (Tr. 91-92).

Natives used the area of the Upper Kandik for hunting (Tr. 48). They hunted and floated down in moose skin boats (Tr. 115). One trader saw a musk ox which the Natives had killed at the headwaters of the river (Tr. 48). Today, no Natives live in the Yukon-Charley area (Tr. 79).

The first European contact with the Yukon-Charley region came as a result of the early fur trade. In 1847 a British trading post was established near the confluence of the Porcupine and Yukon Rivers. In 1848 another British post, Fort Selkirk, was established in

Canada. The Yukon-Charley region is approximately halfway between these posts.

In 1867 the United States purchased Alaska from Russia. Soon thereafter a number of American trading companies became involved in the Alaska fur trade. During the trading season of 1874 only 32 non-Natives lived on Alaska's three major rivers—the Yukon, Kuskokwim, and Tanana. In 1880 the first trading post in the Yukon-Charley area was established. In 1882 another trading post was established near Eagle.

Some of the fur traders who explored the Yukon also prospected for gold. The establishment of trading posts encouraged prospectors because the posts ensured a source for provisions.

In 1892 the first gold strike occurred in the Yukon-Charley area near Circle (Tr. 39). From 1836 to 1902 the Yukon-Charley area was the center of gold activity (Tr. 43). By 1898 five towns had been established on the Yukon between the towns of Eagle and Circle. A gold strike in Nome in 1900, however, quickly depopulated the Yukon-Charley area. The town of Nation was the only settlement between Eagle and Circle which was still populated after 1900 (Tr. 43-44).

After the goldrush in the Yukon-Charley ended, the remaining inhabitants of the area turned to a combination of mining, wage labor, and subsistence hunting, fishing, gathering, and trapping (Exhibit A-2, p. 56). This lifestyle has generally continued to the present.

Although there was prospecting north of the Yukon, there are no known gold strikes, nor have any recorded claims been found on either the Kandik or Nation basins (Tr. 50, 96). The Yukon mineral activity took place south of the Yukon (Tr. 34). Coal was discovered near the mouth of the Nation River and in 1897 a commercial company began mining operations. Approximately 2,000 tons of coal were mined and transported to the Yukon for use on river steamers or for transport to Dawson. The coal was sledged in winter from the mine down the river until the river meandered. At

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that point the coal was taken overland to the Yukon (Tr. 108). The mining operation lasted only a few years since it proved to be uneconomical.

There is no record of traders using the Kandik, although prospectors may have explored the river (Tr. 49). The area north of the Yukon River received historical attention primarily because of the work of the International Boundary Commission in 1911 and 1912. The Commission surveyed and mapped the geography and geology of the 141st meridian between the Porcupine and Yukon Rivers.

In 1911, parties for the International Boundary Commission came into the area, and had four launches at their disposal. Two of these launches were constructed especially for the Boundary Commission. The launches were 40 feet in length, 9 feet wide, and had a draft of approximately 18 inches. These two stern-wheelers, however, drew more water than the designers had intended. Consequently, after the survey work was finished during the summer of 1911, the boats were overhauled and redesigned. As a result, there was a slight increase in the boats' overall speed, and the draft was reduced to between 14 and 16 inches. Together the two launches could handle barges carrying 7 to 12 tons. Commercial steamboats on the Yukon were also utilized to transport men, horses, supplies, and equipment. Poling boats were constructed and utilized by the Boundary Commission on those rivers where it had been determined that the two launches could not operate (Tr. 796-97).

The International Boundary Commission, which surveyed the U.S.-Canadian Boundary in 1910-1912, was supplied by poling boats which were capable of carrying 1 to 1½ tons of supplies (Tr. 49, 90). One man had a contract with the Boundary Commission to deliver hay and grain 90 miles to the border on the Kandik (Tr. 52, 90). Approximately 2 tons of supplies were transported to the Boundary Commission by poling boat and scow (Tr. 50, 812). The poling boats brought supplies up the Kandik River to the vi-

cinity of the boundary. Those bringing the supplies up the Kandik River had to line their boat, but could pole the boat through still places. They also had to make channels with shovels through shallow parts of the river, and then line the boat through the channels. Sometimes they made 5 to 6 miles a day. It took them almost a month to reach their destination and after delivering the supplies, they descended the river in 6 hours. The return trip was made after a cloudburst and the river was very high (Tr. 149 Exhibit A-4).

Once at the boundary, the supplies were packed over land in order to follow the boundary line directly south. No one river or stream flows in that direction, and it was necessary to stick close to the boundary line (Tr. 800-01). The International Boundary Commission paid for the transportation of its supplies (Tr. 67, 100, 164). Horses were used by the Commission only to move men and supplies over relatively short distances (Tr. 123).

Although it is known that supplies were brought up the Nation River valley for the International Boundary Commission, it is uncertain whether these supplies were brought over land or by poling boat. Transport by poling boat, however, was more likely. It appears that men and supplies were brought up the Nation River and then up Hard Luck Creek. In addition to men and supplies, mail was also delivered by this route (Tr. 798, 799).

The peak of fur trading with the Indians was 1880-1884 (Tr. 85). After a regulation which prohibited non-Natives from trapping was lifted, fur trapping expanded and was heavy in the 1920's, 1930's, and 1940's, until fur prices fell (Tr. 37, 50, 79). Trappers on the Kandik and Nation were supplied by steamboats which delivered goods at the mouth of the Kandik and Nation. The goods were cached until the trappers could haul the supplies to their traplines. The supplies were taken up river either by poling boat,

scow, canoe, or by walking or with dog teams in winter (Tr. 54, 67). Furs were brought down the rivers by boat, and sold at Fort Yukon (Exhibit B-4). There were two known trappers on the Kandik in the 1920's and 1930's (Tr. 51). These trappers used a poling boat on the Kandik (Tr. 115). Eight trappers, one of whom received \$8,000 for his furs in one season during the 1930's, trapped the upper Kandik (Tr. 52, 118). A trapping season lasted only 150 days (Exhibit A-4). Some trappers went from the Yukon River up Rock Creek to the Kandik, then up the Kandik, probably by poling boat or folding boat (Tr. 88). The trappers went up Rock Creek to avoid the long meandering part of the Kandik. Two trappers also trapped Rock Creek (Tr. 52).

During a week in August 1978, representatives of the Alaska Division of Forest, Land and Water Management and the U.S. Bureau of Land Management interviewed individuals who were known or believed to have personal knowledge of the Kandik and Nation Rivers. A summary of the interviews was compiled into a report (Exhibit A-4). Certain information contained in that report is important because it relates to use of the Nation River. According to Mr. Beck, a family of trappers used to travel to the head of the Nation River with their winter supplies in a boat equipped with an inboard motor. The family trapped in the headwaters of the river. Further, Christopher Nelson used to boat his trapping supplies upriver to his cabin at the mouth of Jungle Creek. Jungle Creek is above the selection area on the Nation River (Exhibit A-4, p. 1-2). In the 1930's Jim Taylor trapped in the Nation River basin. When the river was high, Taylor took a boat with an outboard motor about 40 miles upriver. He had three or four cabins on the river. Taylor trapped the Hard Luck Creek and Tatonduk River areas. One of Taylor's cabins was located on a side creek, about 35 miles upriver, near the International Boundary (Exhibit A-4, p. 6). Mr. Snow

stated that a 17-foot canoe could be used to haul 600 to 800 pounds up the Nation River in all stages of water level, although it would be necessary at times to line the canoe. He also stated that a 19-foot canoe could be taken upriver for quite a distance (Exhibit A-4, p. 9). In the 1920's, Mr. Stacy was in the upper Nation River country with a partner trapping beaver. They descended the river in June in a mooseskin boat, having reached the river from the Kandik River and Ogilvie River country. They had about 40 beaver skins with them when they descended the river. When they reached the Yukon River, a trapper took them to Eagle. This was the only time Mr. Stacy claimed to have descended the Nation River (Exhibit A-4, p. 10).

There are trapping trails on the Kandik and the Nation and there are 35 to 40 cabins, on both rivers, still used by trappers, hunters, and travelers (Tr. 59, 65). The trails are not meant for summertime use (Tr. 113). At the present time, the trapping season lasts from November until March. Furs are exchanged for cash through middlemen in Eagle. Generally, none who currently trap on either river transport furs by boat or canoe. This is because the middlemen in Eagle want the furs before breakup because the quality of furs decreases after breakup (Tr. 257-59).

Charlie Biederman, a witness for Doyon, lived for many years near the mouth of the Kandik River. He has gone up the Kandik right after the Yukon would break, which would be anywhere from the middle of May to the 20th of May. He has also gone up the Kandik as late as the end of September. Mr. Biederman's reason for going was to hunt. Mr. Biederman has also hunted on the Nation during the last 10 years and he owns a 32-foot river boat with a 4-foot bottom which he built himself.

Mr. Biederman has only gone up the Kandik to trap beaver as far as Johnson's Gorge, which is 24 miles from the mouth of the river and below the selection area. Mr. Biederman never went beyond Johnson's Gorge because there was no reason

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to go farther since game was plentiful until that point and others were trapping above Johnson's Gorge. Mr. Biederman has never run into serious problems with log jams on the Kandik and if he had had a reason to take a 24- or 26-foot river boat that far up the river, in his opinion, nothing would stop him (Tr. 736, 737, 763).

Mr. Biederman testified that quite a few hunters go up the Kandik every year and that these hunters use river boats. These boats are between 24 and 26 feet in length and have a 42-inch or 46-inch bottom. The boats are metal and usually have a lift that the outboard motor sits on. A lift is a device which lifts a motor if the boat is going to be used in shallow water. These hunters are from Fairbanks. At Circle the hunters put their boats into the Yukon and from there they go up to the Kandik River. The hunters go moose hunting as far up the Kandik as 60 or 70 miles. The duration of their stay on the Kandik is usually 4 or 5 days to a week. The moose are loaded into boats and are brought down the river. A moose weighs 500 or 600 pounds, although some are bigger. Some hunters use jet boats (Tr. 719-22).

Breakup is not a single event. During breakup, a segment of the river thaws and results in a large flow of ice for 2 or more days. Later, another segment of the river further north will thaw and result in another ice flow. Accordingly, breakup lasts at least 10 or 12 days and creates many ice flows. During this time, navigation of all rivers is dangerous (Tr. 259).

Transportation by water was one of the critical factors enabling the interior of Alaska to be opened to exploration and settlement (Tr. 94, 95, 806). The Yukon River provided the primary artery through Alaska (Tr. 132). Early Russian and English traders used rough whip-sawed scows and rafts to transport trade goods (Exhibit B-4, p. 135). Soon after the purchase of Alaska by the United States, steamboat traffic on the Yukon began and the supply problems faced by

the early traders and explorers was alleviated. Steamboat traffic on the Yukon was sporadic until gold was discovered in the Klondike, at Fairbanks, and at Nome. The high point in steamboat traffic came in 1904 when more than 200 steamboats of various sizes were on the Yukon (Tr. 132). Steamboats were the primary transportation system which supported the fur trade and goldrush activities in interior Alaska (Tr. 36-37, 44). The use of steamboats was initially restricted to the Yukon and the Porcupine River, which was the only Yukon tributary on which steamboats could be used, until special light draft steamers were designed for use on the Tanana and Koyuk Rivers (Tr. 45).

Dependence on the Yukon River steamboat traffic declined substantially after 1923 when the Alaska railroad provided a link between the port of Seward and the Yukon River (Tr. 132). In 1929 a road was completed which linked Circle and Valdez (Exhibit B-4, p. 175). In 1950 a highway was completed between Eagle and Tetlin Junction (Exhibit A-2, p. 67). These alternate routes of travel led to the end of commercial steamboat travel on the Yukon. By 1955 the Yukon commercial steamboat traffic had ceased (Exhibit A-2, p. 67).

A recent study indicates that commercial traffic on the Yukon between Circle, Eagle and Dawson is not economically feasible. Air and winter overland transportation are used to support development activities in the area. Contractors in oil and gas development in the general area of the Native selections, for example, do not use the Kandik River for transportation. Oil drilling equipment is brought to drilling sites by air and once, during the winter, equipment was brought overland (Tr. 404, 405).

There has been slow economic development in the Yukon-Charley area because of the absence of overland trails, and the Kandik and Nation basins are still undeveloped (Tr. 95). Although there are roads in the Yukon-Charley area there are still no roads north of the Yukon River

and there are no lakes suitable for float planes to land (Tr. 93, 823).

Although the Yukon steamboats carried the bulk of the commercial river traffic, a variety of watercraft has been used historically on the interior waterways.

The Yukon poling boats were adapted from boats used earlier on western rivers. This type of boat was 20 to 30 feet long. At midship the bottom measured from 12 to 20 inches. Tapering sides gave these boats 2½ to 3 feet of beam at the gunwale. Though tapering rapidly at both ends, these boats were usually built with snub noses at both bow and stern. To propel the boat, two or more men would stand in the boat and push the boat upstream by means of long poles. Using a poling boat, two men could transport as much as a ton of cargo (Exhibit A-2, p. 44; Exhibit B-44, p. 158; Tr. 45). In shallow water on tributary streams, a poling boat with a load could travel approximately 10 miles per day (Tr. 747). The larger steamboats were not used on the tributaries of the Yukon because there was not enough freight generated on those streams to call for use of these larger boats. Poling boats, however, were used on tributaries of the Yukon. Poling boats were used on a regular basis to serve communities and transport freight, and tunnel boats were used extensively by the Alaska railroad and others (Tr. 135, 138, 145, 170). There were, however, low draft steamboats developed for use on the Porcupine and other tributaries, which drew only 6 inches of water (Tr. 46).

Motorboats came into use in Alaska after World War I. Some of the first motorboats were converted poling boats (Tr. 137). Lifiable motors were often attached to enable boats to travel over shallows. These boats are in use today and although the draught of the boats is constant, with the engine raised the boats can get over shallow spaces. The boats, accordingly, can be loaded more heavily (Tr. 161, 162). Another type of boat used in Alaska is the tunnel boat. Although tunnel boats were used in

Alaska as early as 1915, they were not used in the Yukon-Charley area until the 1940's (Tr. 161, 723). The "tunnel" was designed to protect the propeller when the boat traveled in shallow water (Tr. 138, 723). A tunnel boat, like a poling boat, could carry a ton of cargo (Tr. 138).

Jet boats are in common use today and have been for the last 7 to 8 years (Tr. 758). Jet boats are flat-bottomed river boats 20-26 feet in length, approximately 4 feet wide, which are equipped with a 25 to 50 h.p. outboard motor with a jet unit (Tr. 567).

Since statehood, there has been recreational use of the Kandik River. BLM's Navigability Investigation Report on the Kandik and Nation Rivers notes that the Kandik and Nation Rivers are becoming popular recreational rivers. At least two parties had been observed on the Kandik in 1978 while three parties were seen on the Nation in 1 day. Users of these river line canoes up and float down (Exhibit B-37).

The overall characterization of the Kandik River for recreational purposes is that it is suitable for people with intermediate canoeing skills, but not for people with minimal skill (Tr. 520). The dangers on the rivers are caused by sweepers and timber piles, rather than from white water problems (Tr. 282).

Discussion, Findings, and Conclusions

In the order issued on October 21, 1977, the Alaska Native Claims Appeals Board noted that the parties were in agreement as to the test of navigability which would be controlling in this matter. The Board ordered that the test of navigability was to be the test set forth in *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926).

There is a distinction between navigability for title and navigability for other purposes. Originally, the courts applied the same test in all navigability cases. In *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), the Supreme Court indicated that navigability for title might be defined differently

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than navigability for other purposes. A major difference between the two legal standards seems to be that, for title navigability, a stream must be navigable in its natural condition at the time the State in which the stream is located joins the Union; whereas navigability for regulation of commerce, or for other reasons, may arise after the date of statehood and may take into account navigational improvements to the stream. The latter is a more liberal test.

As an example of one of the various less stringent tests, in *People v. Mack*, 19 Cal. App. 3rd 1040, 97 Cal. Rptr. 448, 454 (1971), a California court held that recreational use itself established navigability and there was no need to show that the waterway is useful as a public highway for travel and commerce. Whereas, in *Procter v. Sim*, 236 P. 114 (1925), a Washington court held that recreational use alone was not sufficient to establish navigability under the Federal test, but that usefulness for commerce is necessary to establish navigability.

Two Alaskan courts have considered navigability issues. In *U.S. v. Clyde D. Glass, et al.*, Civ. No. 3473 (U.S. Dist. Ct. Nome, Sept. 29, 1941) the District Court for the Territory of Alaska found the Niukluk River to be navigable. In finding the river navigable, the court, without comment, simply applied the Federal test of navigability. In *State of Alaska v. Walt Wigger and Morton de Lima Co., Inc.*, Civ. Action No. 62-388 (Super. Ct., Fourth Judicial Dist., Jan. 29, 1965), the Superior Court for the State of Alaska found the Chena River to be navigable. In its decision, the Superior Court stated that any determination of the navigability of rivers within Alaska involves the application of Federal law, under which it is settled that the test of navigability of a river, for the purpose of adjudicating ownership of a river's bed, is to be determined as of the time of the State's admission to the Union. Further, as to the appropriate test to be applied in determining whether a river is navigable, the

court adopted the principles developed in *The Daniel Ball*, 77 U.S. 557 (1870), *The Montello*, 87 U.S. 430 (1874), *United States v. Holt State Bank*, *supra* at 49, and in *United States v. Utah*, *supra*. In effect, the Superior Court held that the navigability for title test was the appropriate test to be applied.

The State and Doyon contend that the navigability for title test should not be applied in this matter and that a more liberal navigability test should be used.

I find that the navigability for title test must be used in determining the nature of the Kandik and Nation Rivers. The issue is ownership of the beds of the Kandik and Nation Rivers for the purpose of determining whether they are public lands properly charged against Doyon's total acreage entitlement under the Alaska Native Claims Settlement Act. If the rivers are navigable then title to their beds is in the State; if, however, the rivers are nonnavigable then their beds are Federally-owned and are subject to conveyance to Doyon. There does not seem to be a clearer case of navigability for title purposes. In addition, the Alaska Native Claims Appeal Board ordered that the applicable test is that expressed in *United States v. Holt State Bank*, *supra*, which was a title navigability case. Finally, Alaskan courts have applied the title navigability test in similar situations. Accordingly, application of the more restrictive navigability for title test is appropriate.

There are essential elements of the navigability for title test.⁴ Navigability for title is determined by the natural and ordinary condition of a stream at the time that the State in which the stream is located entered the Union. A watercourse is probably nonnavigable for title purposes if artificial improvements are necessary to make it useful for trade and travel. The presence of rapids, sandbars, shallow waters, and other obstructions making navigation difficult or even

⁴ *National Resources Journal*, Vol. 7, Jan. 1967, pp. 8-25.

impossible in sections, however, does not destroy title navigability so long as the river or part of it is usable or susceptible to use as a highway for commerce for a significant portion of the time, *United States v. The Montello*, 87 U.S. 430 (1874); *United States v. Utah*, 283 U.S. 64 (1931). The waters must be usable by the "customary modes of trade or travel on water." The essence of the test is that the waterway must be useful as a highway for travel and trade in the local area. Navigability is a factual question tested not by the amount or volume of commerce carried on a river, but by the extent that the commerce carried relates to the needs of the area it serves. A recent case emphasized that sporadic and short-lived use of a waterway for travel and transportation by local residents for their own purposes and not for hire meets the requirement that a waterway be useful as a highway for commerce. *Utah v. United States*, 403 U.S. 9 (1971).

The United States Supreme Court held in the *Holt* decision that streams which are navigable in fact must be regarded as navigable in law. The Court stated that streams are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. The Court further stated that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels, or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

In *United States v. Appalachian Power Company*, *supra*, the Supreme Court noted that the uses to which streams may be put vary from the carriage of ocean liners to the floating out of logs, and that the density of traffic varies widely from the busy harbors of the seacoast to the sparsely settled regions of the western mountains. The tests as to navigability,

therefore, must take these variations into consideration.

The *Holt* case was an action brought by the United States to quiet title to the bed of Mud Lake in Minnesota, which had been drained and turned into agricultural land at the time the lawsuit was filed. The United States argued that at the time of statehood, before Mud Lake was drained, it was nothing more than a marsh, falling far short of being a navigable body of water.

The Supreme Court held that Mud Lake was navigable. The court relied on three factors. First, Mud Lake was traversed by Mud River, which was both navigable in itself and directly connected with other navigable streams leading out of State. Second, there was evidence that early visitors and settlers in that vicinity used the river and lake as a route of travel, employing the small boats of the period for the purpose of travel. Because the country surrounding the lake was swampy, the waterways were the only dependable routes for travel and trade. Third, merchants in two small settlements several miles up Mud River from the lake had used the river and lake in sending for and bringing in their supplies. The limited navigation and sparse evidence of use was attributable to the fact that trade and travel in the vicinity of the lake were limited.

An important element of the *Holt State Bank* test of navigability requires that waters be usable as highways for commerce by the customary mode of trade and travel on water. The Supreme Court recognized in *Holt* that canoes and small row boats constituted important means of communication and transportation in early days throughout much of the west, and therefore, may be considered "commercial" for purposes of determining navigability for title. *United States v. Holt State Bank*, *supra*, 270 U.S. at 56-57.

In *United States v. Utah*, 283 U.S. 64 (1930), the Supreme Court elaborated upon the definition of navigability set forth in *Holt*. The United

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States had argued that the absence of historical data showing navigation by Indians, fur traders, and early explorers demonstrated that the rivers in question were not navigable. The Court, however, rejected this argument and stated that the nonsettlement of the area in which the rivers were located and the consequent lack of historical data showing navigability should not preclude the possibilities of growth and future profitable use of the rivers. The Court further rejected the argument that evidence of private use of a river is not sufficient to demonstrate capability for commercial use. The Court stated that, although evidence of the actual use of streams and especially of extensive and continued use for commercial purposes may be the most persuasive evidence of navigability, where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. The Court stated that the question of navigability remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these needs may arise in connection with the growth of population, the multiplication of activities, and the development of natural resources. This capacity may be shown by physical characteristics and experiments as well as by the uses to which the streams have been put.

In the *Utah* case, the Court found that certain sections of the San Juan, Green, and Grand Rivers were navigable despite the presence of numerous obstacles such as sand bars, rapids, and rocks which made navigation difficult at times and even impossible on occasion. In finding portions of these rivers to be navigable, the Court emphasized that the waters within the subject sections could be navigated part of the time and thus the subject sections were usable in their natural state. The Court distinguished two

previous cases which had held the Rio Grande in New Mexico and the Red River in western Oklahoma to be non-navigable. In those cases, the use of the streams for purposes of transportation was exceptional, being practicable only in times of temporary high water. See *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1899); *Oklahoma v. Texas*, 258 U.S. 574 (1921).

In *The Montello*, *supra*, the Fox River was found to be navigable. This river, in places, had falls and rapids. Vessels used on the river measured from 70 to 100 feet in length and were 20 feet wide. At some places on the river where it was impracticable for the boats to be floated, the boats would be unloaded and a "portage" would be made until the difficult stretch of the river was passed. At other places on the river, the boats would be pushed with poles or dragged by horses and mules.

The character of a region, its products, and the difficulties or dangers of navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient to establish navigability. Even absence of use over long periods of years, because of changed conditions, the coming of the railroad, or improved highways does not affect the navigability of rivers in the constitutional sense. *Appalachian Electric Power Co.*, *supra* at 409. If a river is susceptible to use at the time of statehood, it is navigable, and the fact that actual use never develops does not destroy that navigability.

In *Utah v. United States*, *supra*, the navigability of the Great Salt Lake was at issue. In that case, the evidence of navigation was not extensive, but the court found it to be sufficient to sustain a finding of navigability. There were, for example, nine boats used from time to time to haul cattle and sheep from the mainland to one of the islands in the lake or from one of the islands to

the mainland. The hauling apparently was done by the owners of the livestock, not by a carrier for the purpose of making money. The business of the boats, therefore, was ranching and not carrying waterborn freight. Further the carriage was limited in the sense that it served only a few people who performed ranching operations along, the shores of the lake. The distinctions, however, were found to be irrelevant because the lake was used as a highway and that is the gist of the Federal test.

BLM contends that the Kandik and Nation Rivers are not navigable because their water levels fluctuate, they are hazardous, and only canoes, lightly loaded, can navigate them, because they are interspersed at various points by gravel bars or log jams. Finally, BLM contends that commercial boats carrying freight for hire have not travelled the rivers.

Doyon and the State contend that the rivers are navigable in their entirety or at least as these rivers pass through the selection areas.

I find that both the Kandik and Nation Rivers are navigable all the way from the Yukon River to the Canadian border, and therefore the rivers, as they flow through the selection areas are navigable.

To be navigable, a body of water must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation, *Proctor v. Sim*, 236 P. 114 (1925). The Kandik and Nation Rivers are tributaries of the Yukon River. The Yukon was historically the major highway of commerce for the whole of the interior of Alaska and the Kandik and Nation have been the only access of reaching a substantial area north of the Yukon. As such, the two rivers meet the proximity test, *Monroe v. State*, 175 P.2d 759 (1946).

Neither the Kandik nor Nation Rivers have been improved at any time. Accordingly, both in 1959 when Alaska entered

the Union and at the present time, the rivers are in their natural and ordinary condition. Although rapids, shallow waters, sweepers, and log jams make navigation difficult on both rivers, the evidence shows that these impediments do not prevent navigation.

The presence of gravel bars, riffles, or occasional log jams in themselves do not make the rivers nonnavigable, *United States v. Utah*, *supra*. Neither the Kandik nor the Nation has falls and rarely do obstructions block the channel completely. This is notwithstanding that there was testimony that one may have to pole or line a boat over shallow places. Even in August, a time of very low flow, several inches of water flowed over the gravel bars.

Boats capable of carrying commercial loads, i.e. such quantities of goods as are necessary on a given trip to produce a profit for the person making the trip, are capable of, and have gone up both rivers from the Yukon to the Canadian border. These are the poling, tunnel and river boats. Charlie Biederman had gone no farther up the Kandik River than Johnson's Gorge because game was plentiful and he, therefore, had no reason to go farther. Mr. Biederman, however, testified that had he had a reason to go farther up the river, nothing would stop him.

Those working for the International Boundary Commission were paid to bring mail and supplies up the entire length of the Kandik and up the Nation to Hard Luck Creek. The Nation above Hard Luck Creek to the Canadian border was trapped by men, some of whom have made profits from furs. Until trapping became unprofitable in the 1940's, the trappers brought supplies up both rivers by boat and brought furs downriver by boat. At the present time, those trapping on both rivers do not bring furs downriver by boat, but this is because middlemen in Eagle to whom the furs are sold prefer to have the furs before breakup and not specifically because of river conditions.

Although use of the Kandik and Nation Rivers has been slight in comparison with other rivers in more populated areas,

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the remote and sparsely settled nature of the area in which the Kandik and Nation Rivers are located is an important consideration. As in *Utah v. United States*, *supra*, carriage of goods on both the Kandik and Nation Rivers has been extremely limited. In fact, the only commerce conducted has been trapping, trading, and the transport of supplies and furs by the few trappers on the river and the supplying of goods and mail to the International Boundary Commission. Nevertheless, despite only limited commerce on the rivers, use of the rivers meet requirements of the Federal test for navigability since the rivers have been used as a highway.

Although standing alone it may not suffice to support a finding of title navigability, use of the rivers by those pursuing a subsistence lifestyle and use of the rivers for recreation corroborate that the rivers are navigable. Hunters and canoeists do not bring their boats to these rivers by road and then use only selected portions of the rivers. Rather, hunters and canoeists get to the upper reaches of both the Kandik and Nation Rivers by way of the Yukon River. Those using the Kandik and Nation for recreation must bring any supplies needed with them and they must carry out any game caught by boat. As was the situation with the original Native inhabitants, those pursuing a subsistence lifestyle are dependent on the rivers for summer travel and given the sparse resources of the Yukon-Charley-Region, the entire lifestyle is one which presupposes the interconnecton of the Kandik and Nation with the Yukon River. Summer fishing is conducted on the Yukon while winter trapping is conducted on the Nation or Kandik. In effect, the Kandik and Nation are not isolated areas for either recreational users nor for those pursuing a subsistence lifestyle. Rather, together with the Yukon River, the rivers are avenues of access to the land north of the Yukon.

At the time of statehood, due to economic decline, all types of activity had

ceased on both the Kandik and Nation Rivers. This nonuse of the rivers at the exact time that Alaska entered the Union, however, does not make the rivers nonnavigable. Use of the rivers by Natives before contact with Europeans, historic use of the rivers by fur trappers, use of the rivers by those working for the International Boundary Commission, and present day use of the rivers clearly establish the navigable nature of the rivers. A short period of nonuse, even though that period fell at the time that the State in which the stream is located entered the Union, does not destroy navigability established at some point while the stream was in its natural condition.

The fact that the rivers are frozen for 7 months of the year and that much of the current mineral exploration of the area is done by use of airplane, does not make the rivers nonnavigable. It is not necessary that navigation continue at all seasons of the year, and a stream does not become nonnavigable even if it has fallen into disuse, *Kemp v. Putnam*, 288 P.2d 837 (1955).

Because of the lack of trails and the rough nature in summer of the land surrounding the Kandik and Nation Rivers, travel by water has been the only feasible means of transport of goods between breakup and the time when the rivers freeze. Although the Kandik and Nation have been used only for intrastate commerce, such a use is acceptable under the navigability for title test. Navigability of a river is not tested by the amount or volume of commerce carried but the extent that the commerce carried relates to the needs of the area it serves. Both the Kandik and Nation are tributaries of the Yukon and even the upper reaches of both rivers are accessible to habitation and transportation routes. The rivers can be used to go someplace, as, for example, those employed by the International Boundary Commission used the Kandik to reach the Canadian boundary and trappers on the Nation used that river to obtain and transport furs. In effect, both rivers have been used for commercial

travel. Although the rivers are remote and the evidence of travel on them is sparse, commerce carried on the rivers has been sufficient to establish navigability since the commerce which has been shown to exist relates to the needs of the region in which the rivers are located. The question as to the practicability of navigating the rivers for profit must be left to the one who undertakes the enterprise.

ORDER

The Kandik and Nation Rivers are navigable streams.

L. K. LUOMA,

Chief Administrative Law Judge.

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ISLAND CREEK COAL CO.

1 IBSMA 316

Decided December 21, 1979

Appeal by the Office of Surface Mining Reclamation and Enforcement from that part of a July 12, 1979, decision by Administrative Law Judge Tom M. Allen vacating Violation No. 2 of Notice of Violation No. 79-I-15-8 issued pursuant to the Surface Mining Control and Reclamation Act of 1977 (Docket No. CH 9-68-R).

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Evidence

Where the evidence presented by OSM in support of a cited violation of the initial regulatory program performance standards is that the inspector relied on representations made to him in writing the violation, such evidence must be sufficient to withstand challenges to the substance of the representations made and to the authority to bind the permittee of the individual making the representations.

2. Surface Mining Control and Reclamation Act of 1977: Topsoil: Generally

A showing of contamination is not a necessary requirement in establishing a topsoil removal violation pursuant to 30 CFR 715.16. Protection of topsoil from contamination is merely a reason for the removal requirement, not a requirement itself.

APPEARANCES: Billy Jack Gregg, Esq., Office of Field Solicitor, Charleston, West Virginia; Shelley D. Hayes, Esq., Office of Solicitor, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from that part of a July 12, 1979, decision by Administrative Law Judge (ALJ) Tom M. Allen vacating Violation No. 2 of Notice of Violation 79-I-

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15-8 issued to Island Creek Coal Co. (Island Creek).¹

While the Board is in agreement with the ALJ's conclusion to vacate Violation No. 2 and therefore affirms that conclusion, we do not agree with other aspects of his decision and modify it as set forth below.

Factual and Procedural Background

On Mar. 28, 1979, three OSM inspectors visited Island Creek's Rebel No. 2 surface coal mining operation in Logan County, West Virginia, and issued Notice of Violation 79-I-15-8 charging Island Creek with (1) allowing discharges from the disturbed area in excess of the applicable effluent limitations for iron and total suspended solids in violation of 30 CFR 715.17(a) and (2) failing "to remove topsoil as a separate operation from areas to be disturbed to prevent the topsoil from being contaminated by spoil" as required by 30 CFR 715.16(a).

Island Creek sought review of the notice of violation; a hearing was held and the ALJ issued his decision on July 12, 1979. He upheld the validity of Violation No. 1, but vacated Violation No. 2. OSM appealed that part of the decision vacating Violation No. 2. OSM filed a timely brief. Island Creek did not file a reply brief nor did it take any

other action in connection with this appeal.

Discussion

The topsoil violation concerned an area of about one acre in size (Tr. 63). In that area, as depicted in OSM's photograph, Exh. 9, a road was being constructed down to the first tier of a fill (Tr. 59). The OSM inspector did not actually go to the violation area because of the "lateness of the day" but observed it from a lower bench level looking across the hollow (Tr. 71-72).

When questioned how he knew there was a topsoil violation, the OSM inspector stated that he had seen "the material actually there, right on the edge of the fill material and also from Mr. Buckberry's statements, as to his method of topsoil removal from this area" (Tr. 69).² The inspector admitted, however, that he did not see any spoil being placed on topsoil and that topsoil could have been removed from the area which was disturbed previous to his inspection, but "after discussing the matter with Mr. Buckberry as to the method of operation on that fill area, it was indicated to me that the topsoil was still in place and would be removed at a later date" (Tr. 70). Thus, it is clear that for the purposes of writing the topsoil violation the inspector was relying on the representations of Buck-

¹ The notice was issued pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271 (a)(3) (Supp. I 1977) and 30 CFR 722.12.

² The inspector explained that he was told that one Joe Buckberry was in charge of the operation and was also the reclamation superintendent of the job (Tr. 106). The record does not disclose who conveyed this information to the inspector.

berry and this was admitted by the inspector (Tr. 76).

Richard J. Bielicki, Director of Engineering, Island Creek Division of Island Creek Coal Co., testified that Buckberry was the reclamation supervisor for Rebel Coal Co., the independent contract miner for Island Creek at this minesite (Tr. 80-82). Bielicki explained Buckberry's position as follows: "He supervises the placing of topsoil on backfill material. He supervises the sampling of the topsoil to see what soil nutrients are required, and he supervises the administration of fertilizer, mulch and the seeding requirements for that backfill area" (Tr. 82). Bielicki stated that Buckberry had nothing to do with the operation aspect, the planning, or the design of Rebel Coal Company's mining in the permit area (Tr. 82). In testimony concerning OSM's Exh. 9, Bielicki stated that he knew that all topsoil was salvaged from the first 2,000 feet of the roadway, but that he could not state for a fact whether topsoil was saved from the remaining 1,500-2,000 feet of the road (Tr. 91-92).

[1] In *Burgess Mining and Construction Corp.*, 1 IBSMA 293, 86 I.D. 656 (1979), a similar factual situation existed, that is, an OSM inspector relied on representations made to him in writing a topsoil violation. In *Burgess* we affirmed the sustaining of the violation by the ALJ because there had been no challenge to either the substance of the representations made

or to the authority of the individual making the representations to bind the company by his statements. These challenges were present in this case. Consequently, while the evidence produced by OSM may have been sufficient to support a topsoil violation, Island Creek presented adequate evidence not only to rebut OSM's evidence but to carry its ultimate burden of persuasion. See 43 CFR 4.1171(b).³ For that reason, we affirm the ALJ's conclusion to vacate the violation.

In reaching this conclusion the ALJ made certain statements and findings with which we do not agree. On page 13 of his decision he stated:

I must therefore find from the evidence that (1) the Act does not make it mandatory for the removal of *all* topsoil encountered in a mining operation but does require the saving of sufficient (and I might add it should be *abundantly* sufficient) to completely satisfy the requirement of the regulatory authority and the Act to reclaim all of the disturbed lands required by the same to be reclaimed as a post-mining operation. [Italics in original.]

In "finding" that the Act does not "make it mandatory" to save all topsoil, the ALJ interpreted the law to require the saving of only an amount of topsoil which is "abundantly sufficient" to satisfy the requirements of the regulatory authority. This interpretation has no basis in law.

³ Although the evidence produced by OSM may have survived an appropriate motion at the conclusion of OSM's presentation, its meager nature enhanced Island Creek's opportunity to carry its burden.

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Carbon Fuel Co., 1 IBSMA 253, 86 I.D. 483 (1979), and *Alabama By-Products Corp.*, 1 IBSMA 239, 86 I.D. 446 (1979), hold that 30 CFR 715.16 requires the removal of all topsoil unless the use of alternative materials is approved by the regulatory authority in accordance with 30 CFR 715.16(a) (4). In *Burgess Mining and Construction Corp.*, *supra* at 298, we stated that, even if the suggestion that less than all topsoil must be removed in every case appeals to common sense, such an exception must be authorized by law upon the approval of the regulatory authority.⁴ There is no evidence here that Island Creek sought or had approval from the regulatory authority to remove less than all the topsoil.

The Administrative Law Judge also stated at page 5: "It would appear that the applicant had applied to the regulatory authority for approval under 30 CFR 715.16 (a) (4) since the permit, according to the respondent's witness, granted the use of 'suitable materials for reclamation.'" The permit in this case was issued in 1975. The fact that a 1975 state permit authorized the use of "suitable materials" for reclamation does not ex-

cuse the permittee from compliance with the Federal interim regulations, nor can such language in the permit be construed as compliance with the alternative materials procedures of 30 CFR 715.16(a) (4). See *Carbon Fuel Co.*, *supra* at 257, 86 I.D. 485 (1979); *Alabama By-Products Corp.*, *supra* at 243, 86 I.D. 448-49 (1979).

[2] Finally, the ALJ stated at page 13 that OSM "failed to show proof of any contamination" in support of the topsoil violation. A sowing of contamination, however, is not a necessary requirement in establishing a violation. The regulation requires that topsoil be removed "[t]o prevent topsoil from being contaminated * * *." 30 CFR 715.16. The protection of topsoil from contamination is merely one reason for the removal requirement; it is not a requirement itself. Therefore, the issue of contamination is not a proper subject for consideration in the context of determining whether or not there has been a topsoil violation.

The ALJ's decision vacating Violation No. 2 of Notice of Violation 79-I-15-8 is affirmed as modified.

MELVIN J. MIRKIN,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

⁴ Although we find the ALJ's interpretation to be in error, we realize that when he issued his decision below he did not have the benefit of these Board decisions.

INDEX-DIGEST

(Note—See front of this volume for tables)

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1. Appellant's contention that under sec. 22 of the Act of June 30, 1834, 4 Stat. 729, 733 (25 U.S.C. § 194 (1976)), the burden of proof cannot be assigned to the tribe is without merit. The issue framed by appellant does not align "Indians" against "whites." The primary relief sought by the tribe is the cancellation of trust patents which can only be held by Indians.....

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1. Assuming, in the light most favorable to appellant, that the allotments at issue were subject to the final *proviso* of sec. 9 of the Act of Mar. 2, 1889, 25 Stat. 888, 891, we find no language in this or other sections of the Act evidencing an intention on the part of Congress that allotments—to be valid—required approval by the Oglala Sioux Tribe.....

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2. Under the "functional" standard to determine administrative standing set forth in *Koniag, Inc. v. Andrus*, 580 F. 2d 601 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.-----
3. State of Alaska selection applications should not be rejected because of conflicts with Native allotment applications which are to be approved without first affording the State notice of such action to be taken and an opportunity to contest the conflicting claims if it desires.-----
4. Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the determination to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not, prior to its appeal, been afforded notice of the election, it should be afforded an opportunity to make such election.-----
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8. When the record shows that, historically, trapping was the primary reason for trade and travel in an area, and where the water body in question was commonly utilized by trappers as a route of trade and travel in boats of the period customarily used to freight supplies, such use will result in a finding that the water body has been used and is susceptible for use as a highway of commerce-----	693
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Valid Existing Rights

1. Pursuant to the policy of the Department of the Interior as set forth in Secretarial Order 3029 (43 FR 55287 (1978)), open-to-entry leases issued prior to the passage of ANCSA must be excluded from lands conveyed to village corporations pursuant to the Alaska Native Claims Settlement Act of Dec. 18, 1971, 85 Stat. 688; 43 U.S.C. §§ 1601-1611 (Supp. V 1975)..... 55, 60
2. Preference rights to purchase set forth in Public Land Order No. 1613, Apr. 7, 1958, that were outstanding as of the date of the passage of ANCSA, are valid existing rights protected by ANCSA..... 189
3. Valid existing rights held by third parties that lead to acquisition of title, must be identified in the conveyancing document and the land covered thereby excluded from the conveyance to the selecting Native corporation..... 189
4. "Valid existing rights" protected by § 14(g) of ANCSA include both interests of a temporary or limited nature and interests leading to the acquisition of title, when such interests were created prior to ANCSA and are being perfected or maintained pursuant to State or Federal law..... 257
5. Application by the State of Alaska for lands under the Federal Airport Act, and compliance with such law leading to the acquisition of title prior to ANCSA, is sufficient to create a valid existing right in the State of Alaska protected by § 14(g) of ANCSA..... 257
6. Pursuant to regulations in 43 CFR 2650.3-1(a), interests protected pursuant to ANCSA which lead to fee title in the State are to be excluded from conveyance to a Native corporation..... 257
7. An open-to-entry lease issued under A.S. 38.05.077, including any associated right to purchase the leased land granted by State statute, is protected as a valid existing right under ANCSA, and the leasehold must be excluded from any conveyance to a Native corporation under ANCSA..... 285
8. Inasmuch as the disputed gravel free use permits were transferred from one State agency, the Division of Lands, to another State agency, the Department of Highways, they do not constitute third-party interests protected as valid existing rights under § 14(g) of ANCSA..... 392

Withdrawals

1. Lands withdrawn pursuant to ANCSA are not subject to § 316 of FLPMA, 43 U.S.C. § 1746 (1976)..... 397
2. On reconsideration, the Board vacates its prior holdings that lands withdrawn under the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), are lands held for the benefit of Indians, Aleuts and Eskimos and thus are not "public lands" within the scope of FLPMA, *supra*, and that FLPMA does not apply to such lands..... 453

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RENUNCIATION OF ENROLLMENT IN METIAKATLA INDIAN COMMUNITY

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1. The right of renunciation or expatriation is the natural and inherent right of the individual..... 217
2. Any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses, although it has been said that such termination will not be inferred "from light and trifling circumstances." 217

APPEALS

(See also Contracts, Grazing Permits and Licenses, Indian Probate, Indian Tribes, Rules of Practice.)

1. Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the determination to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not, prior to its appeal, been afforded notice of the election, it should be afforded an opportunity to make such election..... 442

BUREAU OF INDIAN AFFAIRS

(See also Indian Probate.)

GENERALLY

1. Title I of the Highway Beautification Act, 79 Stat. 1028, which applies to all "public lands or reservations of the United States," does not apply to Indian reservations..... 680
2. California's Outdoor Advertising Act, implementing the Highway Beautification Act, 79 Stat. 1028, may not be applied to non-Indian lessees on the Morongo Indian Reservation..... 680
3. The Department's policy established in 1965 of requiring lessees of Indian lands in California to comply with State standards regulating land use and development can be achieved without subjecting developing tribal governments to the full enforcement powers of the State, viz., through adding appropriate State standards to the provisions of any lease..... 680

BUREAU OF LAND MANAGEMENT

1. Established and longstanding Departmental policy relating to the administration of the simultaneous oil and gas leasing system, premised upon regulatory interpretation, is binding on all employees of the Bureau of Land Management, until such time as it is properly changed..... 234

BUREAU OF RECLAMATION

ENVIRONMENT

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- 1. The requirement for a permit under sec. 404 of the Federal Water Pollution Control Act applies to the Bureau of Reclamation to the same extent as any other person, and with certain exceptions the Bureau must obtain a permit from the Corps of Engineers prior to any discharge of dredged or fill material into the navigable waters..... 400
- 2. Activities "affirmatively authorized by Congress," which are excepted from sec. 10 of the Rivers and Harbors Act of 1899, are *not* excepted from sec. 404 of the Federal Water Pollution Control Act. Notwithstanding the exception of a discharge of dredged or fill material under sec. 10 of the Rivers and Harbors Act, compliance with sec. 404 is required..... 400
- 3. A permit under sec. 404 of the Federal Water Pollution Control Act is required for the discharge of dredged or fill material whenever: (a) the "discharge" constitutes any addition of any pollutant to navigable waters from any discernible, confined and discrete conveyance, including the placement of fill and the building of any structure or impoundment; and (b) the "dredged material" is dredged spoil that is excavated or dredged from the waters of the United States; or (c) the "fill material" includes any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body, including any structure which requires rock, sand, dirt or other material for its construction; and (d) the discharge is made into "waters of the United States," which extend beyond those waters meeting the traditional tests of navigability to those encompassed by the broadest possible constitutional interpretation..... 400
- 4. To secure the exemption under sec. 404(r) of the Federal Water Pollution Control Act for projects described in an environmental statement, compliance with seven specific conditions is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 of the Act for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material..... 400
- 5. To secure the exemption under sec. 404(f) (1) of the Federal Water Pollution Control Act for the maintenance of currently serviceable structures, compliance with four specific conditions is required. The exemption does not apply to the discharge of dredged material incident to maintenance dredging, or to new construction..... 401

EXCESS LANDS

- 1. Sec. 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e (1976), requires the Secretary of the Interior to control and approve the purchase price of both initial sales of excess land, and resales of this formerly excess land until one-half the construction charges allocated to such land has been paid, in order for the land to continue to be eligible for project water..... 306
- 2. In approving the sale price of formerly excess land until one-half the construction charges allocated to such land has been paid, the Secretary of the Interior is required to use the same standard used for approving

BUREAU OF RECLAMATION—Continued

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the sale price of the initial sale of excess land; that is, the sale price must be fixed by the Secretary on the basis of the actual bona fide value of the land on the date of appraisal without reference to the value added by the project. The price approval requirement will not apply to formerly excess lands which were acquired, with Secretarial approval, from excess into non-excess status prior to May 18, 1979, the date of this opinion.-----

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CLASSIFICATION AND MULTIPLE USE ACT OF 1964

1. Classification of lands under the Classification and Multiple Use Act of 1964, 43 U.S.C. § 1411 *et seq.* (1970), does not create reserved water rights.-----

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COAL LEASES AND PERMITS

APPLICATIONS

1. The BLM should presume the validity of mining claims or the development of mineral leases disclosed by abstracts submitted by the preference right lease applicant, and allow the applicant to pursue the remedy of private contests or, failing that, issue a notice of intent to reject the lease application where claims or development are shown, and allow the preference right lease applicant the opportunity to show, on the record, the invalidity of the claims, or lack of development, or both.-----

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LEASES

1. The Secretary may, in computing the fair market value of coal to be leased competitively under privately owned surface, assume a limited surface owner consent cost, based on losses and costs to the surface estate and operation and similar evaluations, regardless of the actual price paid or the amount which a surface owner could otherwise demand for consent.-----
2. Assumption of a limited surface owner consent cost to be used in place of actual cost in the computation of fair market value of coal to be leased competitively is necessary to ensure receipt of fair market value by the public as required by 30 U.S.C. § 201(a) (1976).-----
3. In the exercise of his discretion to lease under the Mineral Leasing Act, the Secretary has authority to decline to issue a coal lease where surface owner consent costs prevent the public from realizing a fair return on the value of the coal.-----

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PERMITS

Generally

1. A prospecting permit which embraces land which is not "unclaimed" and "undeveloped" is a nullity and void as a conveyance of any interest in that land. Land in a mining claim remains "unclaimed" land for the purposes of M-36893 so long as the claim is not validated by discovery of a valuable locatable mineral deposit at the date of permit issuance. Surface disturbing mineral activities, associated with delineation of a mineral ore body which could reasonably be expected to disclose knowledge of an area's coal potential constitute development. The bona fide purchaser provisions of sec. 27(h)(2) of the Mineral Leasing Act do not apply to permits which embrace land that is claimed or developed.-----

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COAL LEASES AND PERMITS—Continued**ROYALTIES**

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1. In determining the amount of royalty due to the United States under a Federal coal lease, it is proper for U.S. Geological Survey to include the amount of the reclamation fee imposed by the Surface Mining Control and Reclamation Act of 1977 as part of the gross value of production where the selling price received at the point of shipment to market is increased by that amount..... 472

COLOR OR CLAIM OF TITLE**GENERALLY**

1. To satisfy the requirements of a class 1 claim under the Color of Title Act, "valuable improvements" must exist on the land at the time the application is filed, or it must be shown that the land has been reduced to cultivation. If land was once cultivated, but is not cultivated at the time the application was filed and has not been cultivated for 10 years previously, the cultivation requirement of the Act has not been satisfied..... 22
2. The burden of proving a valid color of title claim is on the claimant. Where it cannot be said from the evidence presented that the grantors and grantees in the claimant's chain of title acquired a parcel of land with the bona fide belief that the parcel included all the land claimed, the color of title application must be denied..... 22

CULTIVATION

1. To satisfy the requirements of a class 1 claim under the Color of Title Act, "valuable improvements" must exist on the land at the time the application is filed, or it must be shown that the land has been reduced to cultivation. If land was once cultivated, but is not cultivated at the time the application was filed and has not been cultivated for 10 years previously, the cultivation requirement of the Act has not been satisfied..... 22

DESCRIPTION OF LAND

1. While the general rule is that a color of title claim must be based on a deed or other written instrument which on its face purports to convey the land sought, extrinsic evidence may be used to make definite the description in a deed which contains a latent ambiguity..... 22
2. Where extrinsic evidence does not adequately show that predecessors in a color of title claimant's chain of title, whose holdings must be tacked on to establish the requisite 20 years holding for a class 1 claim, could have a bona fide basis for believing that land described as lot 5, shown on the official Government plat on one side of a river, included land on the opposite side of the river, there could not be a good faith holding under color of title..... 22

GOOD FAITH

1. Where extrinsic evidence does not adequately show that predecessors in a color of title claimant's chain of title, whose holdings must be tacked on to establish the requisite 20 years holding for a class 1 claim, could have a bona fide basis for believing that land described as lot 5, shown on the official Government plat on one side of a river, included land on the opposite side of the river, there could not be a good faith holding under color of title..... 22

COLOR OR CLAIM OF TITLE—Continued

IMPROVEMENTS

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1. To satisfy the requirements of a class 1 claim under the Color of Title Act, "valuable improvements" must exist on the land at the time the application is filed, or it must be shown that the land has been reduced to cultivation. If land was once cultivated, but is not cultivated at the time the application was filed and has not been cultivated for 10 years previously, the cultivation requirement of the Act has not been satisfied.-----

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CONSTITUTIONAL LAW

GENERALLY

1. Under the Property Clause, Congress has the power to control the disposition and use of water on, under, or appurtenant to original public domain lands, and it is not lightly inferred that this power has been exercised.-----
2. Federal control over the disposition and use of water in, on, under or appurtenant to Federal land ultimately rests on the Supremacy Clause, which permits the Federal Government to exercise its constitutional prerogatives without regard to State law.-----

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CONTESTS AND PROTESTS

(See also Rules of Practice.)

GENERALLY

1. Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 *et seq.* Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an administrative law judge, who will proceed to schedule a hearing, at which the applicant may produce evidence to establish entitlement to his allotment.-----
2. Where the Bureau of Land Management (BLM) determines that an Alaska Native allotment application should be rejected in part because the Native did not use all of the land applied for, the BLM shall initiate a contest proceeding pursuant to 43 CFR 4.451 *et seq.*-----
3. Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the determination to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not, prior to its appeal, been afforded notice of the election, it should be afforded an opportunity to make such election.-----

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CONTRACTS

(See also Rules of Practice.)

GENERALLY

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- 1. "Interest in an oil and gas lease or offer." If an oil and gas lease offeror in an oral agreement gives another person "a claim or any prospective or future claim to an advantage or benefit from a lease," there would be an interest in the lease or lease offer which must be disclosed under 43 CFR 3102.7. That an offeror might raise a technical legal defense against enforcement of such an agreement in a court does not militate against there being a claim or avoid the consequence of the disclosure regulation or 43 CFR 3112.5-2 prohibiting multiple filing in drawing procedures..... 643
- 2. "Interest in an oil and gas lease or offer." Where affidavits submitted on appeal by an oil and gas lease offeror disclose that prior to the filing of an oil and gas lease offer the offeror orally agreed to give the person filing the offer for him either the opportunity to refuse to purchase the lease under terms and conditions that a third party would make (right of first refusal), or the opportunity to make the first offer before any other offer would be accepted (first right to buy), the offeror has given the person an interest in the offer as defined in the regulations to include a prospective claim to an advantage or benefit from a lease.. 643

CONSTRUCTION AND OPERATION

Generally

- 1. When the Government could not require delivery of a refrigerated storage unit within the original delivery schedule because the building in which the unit was to be installed was nor finished and the Government thereafter continued to negotiate changes in specifications and delivery dates with the contractor, the Board held that the Government had waived the original delivery schedule and that the Government did not regain the right to terminate the contract for default since there was no mutual agreement on a new delivery date and the Government's unilateral attempt to reestablish a specific contractual delivery date was unreasonable as not being within the performance capabilities of the contractor at the time the notice was given..... 503

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- 1. Where imponderables make it difficult to arrive at an accurate measurement of the amount of concrete placed under water, the Board finds that the amount represented by "paid for" concrete minus the amount of concrete admittedly wasted is the preferred method for determining the amount to which the contractor is entitled for the concrete so placed..... 65
- 2. Where a contractor voluntarily signs directives specifying the payments to be made for the additional work ordered without taking any exception thereto, the unqualified acceptance of the directives involved is found to be binding upon the contractor to the extent of the direct costs entailed in performance of the additional work..... 65
- 3. Where the Government has accepted a bid conditioned upon the contractor not being prejudiced by changes resulting from energy related shortages and the parties agree in a change order to an increase in price for asphaltic materials, the Board finds the agreement does not con-

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stitute an accord and satisfaction precluding further price increases where the evidence shows there was no meeting of the minds and this was evident to the contracting officer prior to execution of the change order.....

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4. Under a CPFF contract requiring the completion of a report with on-going monthly Government review of completed portions by a small number of reviewers, the withholding of such review until a postcontract period and a significant expansion of the number of reviewers is found to constitute a change not subject to the specified cost ceiling. In the circumstances presented, the knowledge that the project office had greatly expanded the work of incorporating reviewers' comments into the contract report was imputed to the contracting officer.....

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5. Where the preponderance of the evidence shows that substantial increased costs were incurred by a highway construction contractor, primarily because Government inspection personnel either failed to calibrate or improperly calibrated the density testing machine used to determine compaction compliance, and it is determined that the contractor is entitled to an equitable adjustment, the Board will adopt the amount for quantum reached by the parties at a negotiated settlement, when dissatisfied with both the Government audit and the quantum computation of the contractor, but satisfied that the negotiations were made in good faith, at arm's length, and by individuals thoroughly familiar with the details of the contract and its performance.....

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Allowable Costs

1. Under a CPFF contract requiring the completion of a report with on-going monthly Government review of completed portions by a small number of reviewers, the withholding of such review until a postcontract period and a significant expansion of the number of reviewers is found to constitute a change not subject to the specified cost ceiling. In the circumstances presented, the knowledge that the project office had greatly expanded the work of incorporating reviewers' comments into the contract report was imputed to the contracting officer.....

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Changed Conditions (Differing Site Conditions)

1. Where a clearing contractor claims entitlement to an equitable adjustment based on the standard Differing Site Conditions clause of the contract, and the evidence shows that the principal causes of any increased costs which may have been incurred were heavy rains and failure of the contractor to make a reasonable prebid investigation of the site or examination of specifications, and no evidence of fault on the part of the Government is presented, the Board holds that the contractor has not sustained its burden of proof for entitlement to an equitable adjustment, and the appeal will be denied.....

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Changes and Extras

1. Where the Board finds that the Contracting Officer's Representative required the contractor to expend more effort in field surveys and data collection than required by the contract documents, a constructive change will be found to have occurred.....

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CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Changes and Extras—Continued**

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| 2. Under a CPFF contract requiring the completion of a report with on-going monthly Government review of completed portions by a small number of reviewers, the withholding of such review until a postcontract period and a significant expansion of the number of reviewers is found to constitute a change not subject to the specified cost ceiling. In the circumstances presented, the knowledge that the project office had greatly expanded the work of incorporating reviewers' comments into the contract report was imputed to the contracting officer..... | 478 |
| 3. Where the preponderance of the evidence shows that substantial increased costs were incurred by a highway construction contractor, primarily because Government inspection personnel either failed to calibrate or improperly calibrated the density testing machine used to determine compaction compliance, and it is determined that the contractor is entitled to an equitable adjustment, the Board will adopt the amount for quantum reached by the parties at a negotiated settlement, when dissatisfied with both the Government audit and the quantum computation of the contractor, but satisfied that the negotiations were made in good faith, at arm's length, and by individuals thoroughly familiar with the details of the contract and its performance..... | 493 |
| 4. Where the Government does not issue a written change order and does not give a verbal order which is interpreted by the contractor as a change, no contract change has occurred and the contractor may submit materials conforming to the original specifications. The Government's mere exercise of its option to accept nonconforming goods does not in and of itself constitute a contract change..... | 513 |

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| 1. Where the evidence clearly establishes that the Government specifications were defective in a number of respects but fails to show that many of the costs claimed are attributable to actions of the Government, the Board—noting that it is impossible to determine the amount to which the contractor is entitled with mathematical exactness—finds that the “jury verdict” method of determining the amount of the equitable adjustment is the most appropriate method in the circumstances presented by the instant appeal..... | 65 |
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Duty to Inquire

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| 1. Where a clearing contractor claims entitlement to an equitable adjustment based on the standard Differing Site Conditions clause of the contract, and the evidence shows that the principal causes of any increased costs which may have been incurred were heavy rains and failure of the contractor to make a reasonable prebid investigation of the site or examination of specifications, and no evidence of fault on the part of the Government is presented, the Board holds that the contractor has not sustained its burden of proof for entitlement to an equitable adjustment, and the appeal will be denied..... | 527 |
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General Rules of Construction

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1. When the contractor offers materials which the contracting officer discovers are not in total compliance with the specifications, the contracting officer may accept the material if he finds it to be in the best interests of the Government. That acceptance, however, is not final and conclusive if based on, or induced by, a misrepresentation of a material fact.....

513

Labor Laws

1. When a contractor failed to furnish the number of laborers required under a service contract and failed to cure such deficiency after a notice to show cause why the contract should not be terminated for default, the Board held that termination for default was proper and further held that the Government should continue to withhold earnings under the contract to satisfy first the wage claims by unpaid employees of the contractor as determined by the Department of Labor pursuant to the Service Contract Act of 1965 and secondly to satisfy any claim for excess costs by the contracting agency.....

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Payments

1. Where imponderables make it difficult to arrive at an accurate measurement of the amount of concrete placed under water, the Board finds that the amount represented by "paid for" concrete minus the amount of concrete admittedly wasted is the preferred method for determining the amount to which the contractor is entitled for the concrete so placed.....

65

Waiver and Estoppel

1. When the Government could not require delivery of a refrigerated storage unit within the original delivery schedule because the building in which the unit was to be installed was not finished and the Government thereafter continued to negotiate changes in specifications and delivery dates with the contractor, the Board held that the Government had waived the original delivery schedule and that the Government did not regain the right to terminate the contract for default since there was no mutual agreement on a new delivery date and the Government's unilateral attempt to reestablish a specific contractual delivery date was unreasonable as not being within the performance capabilities of the contractor at the time the notice was given.....

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CONTRACT DISPUTES ACT OF 1978

Interest

1. Where a contractor's claim is not pending before the contracting officer on the effective date, Mar. 1, 1979, of the Contract Disputes Act of 1978, the contractor is ineligible, under sec. 16 thereof, to elect to proceed under the Act. Therefore, an appeal to the Board, involving a claim upon which the final decision of the contracting officer was issued prior to Mar. 1, 1979, and seeking relief pursuant to sec. 12 of the Act, will be dismissed for lack of jurisdiction.....

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CONTRACTS—Continued**CONTRACT DISPUTES ACT OF 1978—Continued****Jurisdiction**

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1. Where a contractor's claim is not pending before the contracting officer on the effective date, Mar. 1, 1979, of the Contract Disputes Act of 1978, the contractor is ineligible, under sec. 16 thereof, to elect to proceed under the Act. Therefore, an appeal to the Board, involving a claim upon which the final decision of the contracting officer was issued prior to Mar. 1, 1979, and seeking relief pursuant to sec. 12 of the Act, will be dismissed for lack of jurisdiction..... 508
2. A contractor may not proceed under the provisions of the Contract Disputes Act of 1978 where the appeal is from a final decision of the contracting officer rendered and received by the appellant prior to the effective date of the Act..... 520

DISPUTES AND REMEDIES**Burden of Proof**

1. An appellant will be held to have failed to sustain its burden of proof and the appeal will be denied where appellant's case is submitted on the record without a hearing and the record consists only of claim letters and pleadings alleging that the contracting officer's findings of fact and decision are erroneous in certain respects. Disputed allegations do not constitute evidence and cannot be accepted as proof of facts..... 475
2. Where a clearing contractor claims entitlement to an equitable adjustment based on the standard Differing Site Conditions clause of the contract, and the evidence shows that the principal causes of any increased costs which may have been incurred were heavy rains and failure of the contractor to make a reasonable prebid investigation of the site or examination of specifications, and no evidence of fault on the part of the Government is presented, the Board holds that the contractor has not sustained its burden of proof for entitlement to an equitable adjustment, and the appeal will be denied..... 527

Damages**Liquidated Damages**

1. Where the evidence shows no meeting of the minds between a completing surety and the Government on the matter of the surety's liability for liquidated damages, the Government does not waive the right to assess liquidated damages under a novation theory merely by allowing the surety, otherwise liable for liquidated damages under the contract, to complete performance of the contract terminated for default..... 206

Measurement

1. Where imponderables make it difficult to arrive at an accurate measurement of the amount of concrete placed under water, the Board finds that the amount represented by "paid for" concrete minus the amount of concrete admittedly wasted is the preferred method for determining the amount to which the contractor is entitled for the concrete so placed..... 65

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1. Where imponderables make it difficult to arrive at an accurate measurement of the amount of concrete placed under water, the Board finds that the amount represented by "paid for" concrete minus the amount of concrete admittedly wasted is the preferred method for determining the amount to which the contractor is entitled for the concrete so placed.....	65
2. Where the evidence clearly establishes that the Government specifications were defective in a number of respects but fails to show that many of the costs claimed are attributable to actions of the Government, the Board—noting that it is impossible to determine the amount to which the contractor is entitled with mathematical exactness—finds that the "jury verdict" method of determining the amount of the equitable adjustment is the most appropriate method in the circumstances presented by the instant appeal.....	65
3. When arguments advanced in a motion for reconsideration convince the Board that the formula used in determining an equitable adjustment was not the most accurate method but where neither party submits a better method, the Board will vacate its original finding regarding the equitable adjustment and make a recomputation based on the evidence of record.....	125
4. Where the evidence supports entitlement of a contractor to an equitable adjustment resulting from a constructive change, but fails to establish that all the claimed extra costs were incurred as a direct result of the constructive change, the Board will employ the jury verdict approach in order to determine the appropriate amount to be awarded to the contractor.....	349
5. Where the preponderance of the evidence shows that substantial increased costs were incurred by a highway construction contractor, primarily because Government inspection personnel either failed to calibrate or improperly calibrated the density testing machine used to determine compaction compliance, and it is determined that the contractor is entitled to an equitable adjustment, the Board will adopt the amount for quantum reached by the parties at a negotiated settlement, when dissatisfied with both the Government audit and the quantum computation of the contractor, but satisfied that the negotiations were made in good faith, at arm's length, and by individuals thoroughly familiar with the details of the contract and its performance.....	493
6. Where a clearing contractor claims entitlement to an equitable adjustment based on the standard Differing Site Conditions clause of the contract, and the evidence shows that the principal causes of any increased costs which may have been incurred were heavy rains and failure of the contractor to make a reasonable prebid investigation of the site or examination of specifications, and no evidence of fault on the part of the Government is presented, the Board holds that the contractor has not sustained its burden of proof for entitlement to an equitable adjustment, and the appeal will be denied.....	527

CONTRACTS—Continued**DISPUTES AND REMEDIES—Continued****Jurisdiction**

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| 1. A claim by a concessioner under a National Park Service Contract is dismissed as beyond the purview of the Board's jurisdiction where the contract contains no disputes clause and by its express terms the Contract Disputes Act of 1978 is not applicable to the claim asserted.... | 197 |
| 2. The award of a contract to a statutorily debarred bidder was properly canceled upon discovery of the debarred status and there being no valid contract between the parties, the Board is without jurisdiction to consider an appeal..... | 329 |
| 3. A contractor may not proceed under the provisions of the Contract Disputes Act of 1978 where the appeal is from a final decision of the contracting officer rendered and received by the appellant prior to the effective date of the Act..... | 520 |

Termination for Default**Generally**

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| 1. Where the evidence shows no meeting of the minds between a completing surety and the Government on the matter of the surety's liability for liquidated damages, the Government does not waive the right to assess liquidated damages under a novation theory merely by allowing the surety, otherwise liable for liquidated damages under the contract, to complete performance of the contract terminated for default..... | 206 |
| 2. When a contractor failed to furnish the number of laborers required under a service contract and failed to cure such deficiency after a notice to show cause why the contract should not be terminated for default, the Board held that termination for default was proper and further held that the Government should continue to withhold earnings under the contract to satisfy first the wage claims by unpaid employees of the contractor as determined by the Department of Labor pursuant to the Service Contract Act of 1965 and secondly to satisfy any claim for excess costs by the contracting agency..... | 469 |
| 3. When the Government could not require delivery of a refrigerated storage unit within the original delivery schedule because the building in which the unit was to be installed was not finished and the Government thereafter continued to negotiate changes in specifications and delivery dates with the contractor, the Board held that the Government had waived the original delivery schedule and that the Government did not regain the right to terminate the contract for default since there was no mutual agreement on a new delivery date and the Government's unilateral attempt to reestablish a specific contractual delivery date was unreasonable as not being within the performance capabilities of the contractor at the time the notice was given..... | 504 |

FORMATION AND VALIDITY**Authority to Make**

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| 1. Where an award is made to a firm while one of the partners is under debarment for violation of a labor statute due to administrative oversight, the contracting officer is without authority to make a valid award, and the purported contract is void ab initio..... | 329 |
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CONTRACTS—Continued**FORMATION AND VALIDITY—Continued****Bid Award**

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1. Where the contractor's bid is accepted during an extension of the bid acceptance period conditioned upon the contractor not being prejudiced by changes resulting from energy related shortages, the Board finds that the contractor's conditional acceptance of a change order increasing prices for asphaltic materials to a certain date continued the bid qualification in effect and does not preclude recovery of asphaltic price increases thereafter..... 182

Legality

1. Where an award is made to a firm while one of the partners is under debarment for violation of a labor statute due to administrative oversight, the contracting officer is without authority to make a valid award, and the purported contract is void ab initio..... 329

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1. When the contractor offers materials which the contracting officer discovers are not in total compliance with the specifications, the contracting officer may accept the material if he finds it to be in the best interests of the Government. That acceptance, however, is not final and conclusive if based on, or induced by, a misrepresentation of a material fact..... 513
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1. When the contractor offers materials which the contracting officer discovers are not in total compliance with the specifications, the contracting officer may accept the material if he finds it to be in the best interests of the Government. That acceptance, however, is not final and conclusive if based on, or induced by, a misrepresentation of a material fact..... 513

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1. To secure the exemption under sec. 404(r) of the Federal Water Pollution Control Act for projects described in an environmental statement, compliance with seven specific conditions is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 of the Act for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.....

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ENVIRONMENTAL QUALITY*(See also Water Pollution Control.)***ENVIRONMENTAL STATEMENTS**

1. To secure the exemption under sec. 404(r) of the Federal Water Pollution Control Act for projects described in an environmental statement, compliance with seven specific conditions is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 of the Act for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.....

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ESTOPPEL

1. Estoppel to preclude a charge of trespass is not invoked against BLM where BLM's partially completed fences on Federal land do not restrain cattle and there is no evidence that BLM agreed to construct and/or maintain said fences for the benefit of the grazer, and such grazer was at all times aware of these facts.....
2. The grazing regulations (43 CFR 4140.1(b)(1), *inter alia*) (formerly 43 CFR 4112.3-1 (a) and (b)) place the responsibility of controlling cattle squarely on the grazer, and Government range management policies as implemented under acts of Congress cannot be asserted to bar sanctions where trespasses have been proved, or to estop BLM from alleging trespasses.....

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1. Where an oil and gas lease offeror fails to respond within a prescribed period of time to an order to submit specific information necessary to determine whether his offer is valid, it is appropriate to reject the offer.....
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| 3. Where the evidence as to specific trespass indicates that of a number of cattle counted some were located on private intermingled land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands..... | 133 |
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| 1. After holding a hearing pursuant to the Administrative Procedure Act, an administrative law judge may properly find that a person has committed a grazing trespass if that finding is in accordance with and supported by reliable, probative and substantial evidence..... | 133 |
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| 1. Estoppel to preclude a charge of trespass is not invoked against BLM where BLM's partially completed fences on Federal land do not restrain cattle and there is no evidence that BLM agreed to construct and/or maintain said fences for the benefit of the grazier, and such grazier was at all times aware of these facts..... | 133 |
| 2. The grazing regulations (43 CFR 4140.1(b)(1), <i>inter alia</i>) (formerly 43 CFR 4112.3-1(a) and (b)) place the responsibility of controlling cattle squarely on the grazier, and Government range management policies as implemented under acts of Congress cannot be asserted to bar sanctions where trespasses have been proved, or to estop BLM from alleging trespasses..... | 133 |

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| 1. The Federal Land Policy and Management Act, 43 U.S.C. § 1701 <i>et seq.</i> (1976), does not establish any reserved rights in BLM lands..... | 557 |
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persons pursuant to State law as authorized by the Desert Land Act; (b) the right of the United States to use unappropriated water for the congressionally recognized and mandated purposes set forth in legislation providing for the management of the public domain; and (c) application by the United States to secure water rights pursuant to State law for these purposes.....

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4. FLPMA, the Taylor Grazing Act, the O&C Act, and other statutes permit the United States to appropriate water for the diverse purposes found in the various statutes.....

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5. FLPMA authorizes the BLM to appropriate water for such uses as fish and wildlife maintenance and protection, scenic value preservation, and human consumption, and protection of areas of critical environmental concern.....

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GRAZING LEASES AND PERMITS

1. Where two preference right applicants file conflicting applications for a grazing lease, sec. 402(c) of FLPMA, 43 U.S.C. § 1752(c) (1976), mandates issuance of the new lease to the holder of the expiring lease provided that the holder of the expiring lease maintains his or her preference right qualifications and is otherwise in conformance with the applicable rules and regulations.....

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RECORDATION OF MINING CLAIMS AND ABANDONMENT

1. Since an amended notice merges with the original notice, the filing of the amended notice, for purposes of recordation under either sec. 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information required by the applicable regulations, constitutes compliance with the recording requirements of those Acts.....

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WILDERNESS

1. Sec. 603 requires the Secretary to study all roadless areas of 5,000 acres or more and roadless islands with wilderness characteristics, and report his recommendations to the President as to the suitability or nonsuitability for preservation as wilderness of each such area. The Secretary may not make multiple-use trade-offs in determining which public land areas qualify for wilderness study status.....
2. For the purpose of BLM wilderness review, the term "roadless" means the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.....
3. Sec. 603(a) requires that the Secretary report to the President by July 1, 1980, his recommendations as to the suitability for wilderness preservation of all formally identified natural or primitive areas designated prior to Nov. 1, 1975. Only those areas for which a notice of designation was published in the *Federal Register* are subject to this accelerated review and reporting requirement.....
4. Sec. 603 of FLPMA does not apply to those areas of the Oregon and California and Coos Bay Wagon Road lands which are being managed for commercial timber production. Sec. 603 does apply to those areas not being managed for commercial timber production.....

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7. Management of sec. 603 study areas should be guided by the principle that developmental activity must be carefully regulated to insure it is compatible with wilderness, or that its imprint on wilderness is temporary.....	90
8. Sec. 603 provides that mining, grazing, and mineral leasing may continue in wilderness study areas in the same manner and degree as on Oct. 21, 1976, even if impairment of an area's suitability for wilderness results.....	90
9. The words "existing" and "manner and degree" in sec. 603(c) should be read in conjunction with the words "mining and grazing uses" to establish as a benchmark the physical and aesthetic impact a mining or grazing activity was having on an identified or potential wilderness study area on Oct. 21, 1976.....	90
10. The existing mining use exception for mining and mineral leasing is limited geographically by the area of active development, and the logical adjacent continuation of the existing activity, not necessarily the boundary of the particular mining claim or mineral lease on which the operation is located.....	90
11. When the impact from mining and grazing activities on a wilderness study area differs in manner and degree from the impact from such activity on Oct. 21, 1976, the Secretary must regulate the activity to prevent impairment of the area's suitability for preservation as wilderness....	90
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14. Areas under review for designation as wilderness remain available for appropriation under the mining laws, unless withdrawn for reasons other than protection of wilderness.....	91

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1. Denial of request for USGS's estimates of present value of royalties and taxes based on proprietary and confidential information furnished by sources outside Government is legally supportable under exemptions (4) and (9) of Freedom of Information Act (FOIA) since release would be the same as releasing the proprietary and confidential information from which estimates were derived as well as the geological and geophysical data. Further, exemption (5) of FOIA may be used as a basis for protecting pre-sale estimates of value for a tract on which no bids are received since this is part of Departmental's deliberative process of decisionmaking.....

GRAZING LEASES

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- 1. An area manager's decision apportioning lands between two grazing lease applicants ordinarily will not be disturbed where both applicants have equal preference rights, the apportionment is consistent with the regulatory criteria of 43 CFR 4121.2-1(d) (2), and the decision is not shown to be arbitrary or capricious. However, where a new statute, sec. 402 of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1752(c) (West Supp. 1978), dictates that in certain circumstances "the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease," the apportionment must be conformed therewith.....
- 2. In view of 43 U.S.C.A. § 1752(c) (West Supp. 1978), which dictates that in certain circumstances the present grazing user shall have a right of first refusal for any new lease, 43 CFR 4110.5 (43 FR 29070, July 5, 1978), must be read *in pari materia* therewith and with 43 CFR 4130.2(e) (43 FR 29072) to be construed as a valid regulation and must be interpreted not to apply where the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria.....

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APPORTIONMENT OF LAND

- 1. An area manager's decision apportioning lands between two grazing lease applicants ordinarily will not be disturbed where both applicants have equal preference rights, the apportionment is consistent with the regulatory criteria of 43 CFR 4121.2-1(d)(2), and the decision is not shown to be arbitrary or capricious. However, where a new statute, sec. 402 of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1752(c) (West Supp. 1978), dictates that in certain circumstances "the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease," the apportionment must be conformed therewith.....
- 2. In view of 43 U.S.C.A. § 1752(c) (West Supp. 1978), which dictates that in certain circumstances the present grazing user shall have a right of first refusal for any new lease, 43 CFR 4110.5 (43 FR 29070), must be read *in pari materia* therewith and with 43 CFR 4130.2(e) (43 FR 29072) to be construed as a valid regulation and must be interpreted not to apply where the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria.....

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PREFERENCE RIGHT APPLICANTS

- 1. Where two preference right applicants file conflicting applications for a grazing lease, sec. 402(c) of FLPMA, 43 U.S.C. § 1752(c) (1976), mandates issuance of the new lease to the holder of the expiring lease provided that the holder of the expiring lease maintains his or her preference right qualifications and is otherwise in conformance with the applicable rules and regulations.....

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RENEWAL

- 1. Where two preference right applicants file conflicting applications for a grazing lease, sec. 402(c) of FLPMA, 43 U.S.C. § 1752(c) (1976), mandates issuance of the new lease to the holder of the expiring lease provided that the holder of the expiring lease maintains his or her preference right qualifications and is otherwise in conformance with the applicable rules and regulations.....

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GRAZING PERMITS AND LICENSES

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1. Estoppel to preclude a charge of trespass is not invoked against BLM where BLM's partially completed fences on Federal land do not restrain cattle and there is no evidence that BLM agreed to construct and/or maintain said fences for the benefit of the grazier, and such grazier was at all times aware of these facts..... 133
2. The grazing regulations (43 CFR 4140.1(b)(1), *inter alia*) (formerly 43 CFR 4112.3-1(a) and (b)) place the responsibility of controlling cattle squarely on the grazier, and Government range management policies as implemented under acts of Congress cannot be asserted to bar sanctions where trespasses have been proved, or to estop BLM from alleging trespasses..... 133
3. An administrative law judge's finding that trespasses were willful, grossly negligent, and repeated will not be disturbed on appeal where the record amply supports such finding..... 134
4. Where penalties imposed by two administrative law judges for trespasses are supported by the records and comport with the proscriptions of the regulations they will not be modified on appeal except insofar as they conflict with respect to a particular grazier in a particular grazing district..... 134

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1. An administrative law judge's finding that trespasses were willful, grossly negligent, and repeated will not be disturbed on appeal where the record amply supports such finding..... 134
2. Where penalties imposed by two administrative law judges for trespasses are supported by the records and comport with the proscriptions of the regulations they will not be modified on appeal except insofar as they conflict with respect to a particular grazier in a particular grazing district..... 134

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1. Where the evidence as to specific trespass indicates that of a number of cattle counted some were located on private intermingled land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands..... 133
2. An administrative law judge's finding that trespasses were willful, grossly negligent, and repeated will not be disturbed on appeal where the record amply supports such finding..... 134
3. Where penalties imposed by two administrative law judges for trespasses are supported by the records and comport with the proscriptions of the regulations they will not be modified on appeal except insofar as they conflict with respect to a particular grazier in a particular grazing district..... 134

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(See also Administrative Procedure, Grazing Permits and Licenses, Indian Probate, Mining Claims, Multiple Mineral Development Act, Rules of Practice, Water Pollution Control.)

- 1. Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.541 *et seq.* Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an administrative law judge, who will proceed to schedule a hearing, at which the applicant may produce evidence to establish entitlement to his allotment..... 279
- 2. Where the Bureau of Land Management (BLM) determines that an Alaska Native allotment application should be rejected in part because the Native did not use all of the land applied for, the BLM shall initiate a contest proceeding pursuant to 43 CFR 4.451 *et seq.*..... 342
- 3. Where legal conclusions are reached in an appellate decision upon undisputed facts, and there has been no proffer of further facts which could compel different legal conclusions, no useful purpose would be served for a hearing, and a request therefor is properly denied..... 346

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- 1. The Board lacks jurisdiction to adjudicate the validity of homestead entries; the Board, rather, adjudicates the effect of ANCSA on such entries 664

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- 1. Settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of Mar. 4, 1927, 43 U.S.C. §§ 316, 316a-316o (1976), does not create any rights by virtue of such settlement under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by 43 U.S.C. § 1617 (1976), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease *pro tanto*, but the grazing lease does not preclude the filing of a State selection application which, when filed, segregates the land from all appropriation based upon settlement on location..... 346

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- 1. Settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of Mar. 4, 1927, 43 U.S.C. §§ 316, 316a-316o (1976), does not create any rights by virtue of such settlement under the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by 43 U.S.C. § 1617 (1976), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease *pro tanto*, but the grazing lease does not preclude the filing of a State selection application which, when filed, segregates the land from all appropriation based upon settlement or location..... 346

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2. Appellant's contention that under sec. 22 of the Act of June 30, 1834, 4 Stat. 729, 733 (25 U.S.C. § 194 (1976)), the burden of proof cannot be assigned to the tribe is without merit. The issue framed by appellant does not align "Indians" against "whites." The primary relief sought by the tribe is the cancellation of trust patents which can only be held by Indians..... 425
3. The issuance of a trust patent for an Indian allotment carries with it a presumption of proper performance as well as the implied finding of every fact made a prerequisite to the patent's issue..... 425
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2. Congressional intent to modify or abrogate Indian property rights must be clear and cannot be lightly inferred..... 3
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2. The courts have recognized Indian-custom divorces so long as the Indians continue in tribal relations..... 213
3. In recognizing the validity of Indian-custom divorces, no distinction is made in the kind of marriage which such divorce dissolves so long as the parties contracting the marriage and effecting the divorce are Indian wards of the Government and living in tribal relations..... 213
4. A divorce by Indian custom may be accomplished unilaterally by either of the parties to the marriage..... 213
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| 2. Public Law 280, 67 Stat. 588-90, did not grant to States general civil regulatory powers over Indian reservations. Nor could this be accomplished by Department regulation, Secretarial Order or other directive.. | 680 |
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1. A prospecting permit which embraces land which is not "unclaimed" and "undeveloped" is a nullity and void as a conveyance of any interest in that land. Land in a mining claim remains "unclaimed" land for the purposes of M-36893 so long as the claim is not validated by discovery of a valuable locatable mineral deposit at the date of permit issuance. Surface disturbing mineral activities, associated with delineation of a mineral ore body which could reasonably be expected to disclose knowledge of an area's coal potential constitute development. The bona fide purchaser provisions of sec. 27(h)(2) of the Mineral Leasing Act do not apply to permits which embrace land that is claimed or developed.....

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2. An amended location notice generally relates back, where no adverse rights have intervened, to the date of the original location. To the extent, however, that an amended location merely furthers rights acquired by a valid subsisting location and does not embrace additional or new land, withdrawal of land subject to existing rights will not prevent the amended location from relating back to the original location..... 539
3. Since an amended notice merges with the original notice, the filing of the amended notice, for purposes of recordation under either sec. 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information required by the applicable regulations, constitutes compliance with the recording requirements of those Acts..... 539
4. Except for claims held under 30 U.S.C. § 38 (1976), a failure to record a mining claim as required by State law, coupled with a withdrawal of the land prior to any curative action, invalidates the claim, and thus precludes subsequent amendment of the claim..... 539
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1. The BLM should presume the validity of mining claims or the development of mineral leases disclosed by abstracts submitted by the preference right lease applicant, and allow the applicant to pursue the remedy of private contests or, failing that, issue a notice of intent to reject the lease application where claims or development are shown, and allow the preference right lease applicant 'the opportunity to show, on the record, the invalidity of the claims, or lack of development, or both..... 627

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1. For the purpose of Departmental adjudication, an amended location is one made in furtherance of an earlier valid location, while a relocation is one which is adverse to the prior location..... 538
2. An amended location notice generally relates back, where no adverse rights have intervened, to the date of the original location. To the extent, however, that an amended location merely furthers rights acquired by a valid subsisting location and does not embrace additional or new land, withdrawal of land subject to existing rights will not prevent the amended location from relating back to the original location..... 539
3. Since an amended notice merges with the original notice, the filing of the amended notice, for purposes of recordation under either sec. 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information required by the applicable regulations, constitutes compliance with the recording requirements of those Acts..... 539
4. Except for claims held under 30 U.S.C. § 38 (1976), a failure to record a mining claim as required by State law, coupled with a withdrawal of the land prior to any curative action, invalidates the claim, and thus precludes subsequent amendment of the claim..... 539
5. An oral transfer of a mining claim, though contrary to the statute of frauds, will not serve to invalidate the claim, and a person subsequently seeking to record the claim will be afforded the opportunity to prove that the transfer actually occurred..... 539
6. Where there are factual questions relating to whether action taken subsequent to a withdrawal is in the nature of an amendment or whether it constitutes a relocation, the mineral claimant will be granted the opportunity to show that the subsequent action was a permissible amendment..... 539

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1. For the purpose of Departmental adjudication, an amended location is one made in furtherance of an earlier valid location, while a relocation is one which is adverse to the prior location..... 538
2. An amended location notice generally relates back, where no adverse rights have intervened, to the date of the original location. To the extent, however, that an amended location merely furthers rights acquired by a valid subsisting location and does not embrace additional or new land, withdrawal of land subject to existing rights will not prevent the amended location from relating back to the original location..... 539

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3. Since an amended notice merges with the original notice, the filing of the amended notice, for purposes of recordation under either sec. 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information required by the applicable regulations, constitutes compliance with the recording requirements of those Acts..... 539
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6. Where there are factual questions relating to whether action taken subsequent to a withdrawal is in the nature of an amendment or whether it constitutes a relocation, the mineral claimant will be granted the opportunity to show that the subsequent action was a permissible amendment..... 539

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1. Since an amended notice merges with the original notice, the filing of the amended notice, for purposes of recordation under either sec. 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information required by the applicable regulations, constitutes compliance with the recording requirements of those Acts..... 539

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1. For the purpose of Departmental adjudication, an amended location is one made in furtherance of an earlier valid location, while a relocation is one which is adverse to the prior location..... 538
2. An amended location notice generally relates back, where no adverse rights have intervened, to the date of the original location. To the extent, however, that an amended location merely furthers rights acquired by a valid subsisting location and does not embrace additional or new land, withdrawal of land subject to existing rights will not prevent the amended location from relating back to the original location..... 539
3. Since an amended notice merges with the original notice, the filing of the amended notice, for purposes of recordation under either sec. 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information required by the applicable regulations, constitutes compliance with the recording requirements of those Acts..... 539
4. Except for claims held under 30 U.S.C. § 38 (1976), a failure to record a mining claim as required by State law, coupled with a withdrawal of the land prior to any curative action, invalidates the claim, and thus precludes subsequent amendment of the claim..... 539

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| 6. Where there are factual questions relating to whether action taken subsequent to a withdrawal is in the nature of an amendment or whether it constitutes a relocation, the mineral claimant will be granted the opportunity to show that the subsequent action was a permissible amendment..... | 539 |

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| 1. For the purpose of Departmental adjudication, an amended location is one made in furtherance of an earlier valid location, while a relocation is one which is adverse to the prior location..... | 538 |
| 2. An amended location notice generally relates back, where no adverse rights have intervened, to the date of the original location. To the extent, however, that an amended location merely furthers rights acquired by a valid subsisting location and does not embrace additional or new land, withdrawal of land subject to existing rights will not prevent the amended location from relating back to the original location..... | 539 |
| 3. Since an amended notice merges with the original notice, the filing of the amended notice, for purposes of recordation under either sec. 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information required by the applicable regulations, constitutes compliance with the recording requirements of those Acts..... | 539 |
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| 5. An oral transfer of a mining claim, though contrary to the statute of frauds, will not serve to invalidate the claim, and a person subsequently seeking to record the claim will be afforded the opportunity to prove that the transfer actually occurred..... | 539 |
| 6. Where there are factual questions relating to whether action taken subsequent to a withdrawal is in the nature of an amendment or whether it constitutes a relocation, the mineral claimant will be granted the opportunity to show that the subsequent action was a permissible amendment..... | 539 |

MULTIPLE MINERAL DEVELOPMENT ACT**GENERALLY**

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| 1. A prospecting permit which embraces land which is not "unclaimed" and "undeveloped" is a nullity and void as a conveyance of any interest in that land. Land in a mining claim remains "unclaimed" land for the purposes of M-36893 so long as the claim is not validated by discovery of a valuable locatable mineral deposit at the date of permit issuance. Surface disturbing mineral activities, associated with delineation of a mineral ore body which could reasonably be expected to disclose knowledge of an area's coal potential constitute development. The bona fide purchaser provisions of sec. 27(h)(2) of the Mineral Leasing Act do not apply to permits which embrace land that is claimed or developed..... | 627 |
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NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

ENVIRONMENTAL STATEMENTS

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- 1. To secure the exemption under sec. 404(r) of the Federal Water Pollution Control Act for projects described in an environmental statement, compliance with seven specific conditions is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 of the Act for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.....

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NATIONAL PARK SERVICE

GENERALLY

- 1. Since an amended notice merges with the original notice, the filing of the amended notice, for purposes of recordation under either sec. 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information required by the applicable regulations, constitutes compliance with the recording requirements of those Acts.....

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NATIONAL PARK SERVICE AREAS

GENERALLY

- 1. The Act of Mar. 27, 1978, 92 Stat. 166, 16 U.S.C.A. § 1a-1 (West Supp. 1979), provides that actions taken in derogation of park values and purposes shall not be authorized unless specifically provided by Congress, in order to ensure that the resources and values of areas in the National Park System are afforded the highest protection and care in governmental decisions.....

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WATER RIGHTS

- 1. The particular reserved water rights for national park and national monument areas include water required for scenic, natural, and historic conservation uses; wildlife conservation uses; sustained public enjoyment uses; and National Park Service personnel uses; all of which are intimately related to the fundamental purpose for park and monument reservation, as articulated in 16 U.S.C. § 1 (1976).....
- 2. Among other reserved water rights for national parks and national monuments, 16 U.S.C. § 1 (1976) encompasses reserved water rights for concession uses to provide sustained public enjoyment and reserved water rights for water-borne public enjoyment and recreation.....
- 3. Congress has taken no action subsequent to the National Park Service Organic Act of Aug. 25, 1916, 39 Stat. 535, 16 U.S.C. § 1 (1976), to negate the implied intent contained in the Organic Act that all unappropriated waters necessary to fulfill the purposes of park areas are reserved as of the date of the enabling legislation.....
- 4. The discretionary authority contained in the Act of Aug. 7, 1946, 60 Stat. 885, 16 U.S.C. § 17j-2(g) (1976), authorizing the National Park Service to acquire water rights in accordance with local laws, is not inconsistent with the assertion of the reserved water rights principle and is readily distinguishable from Acts requiring deference to State water law.....

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NATIONAL PARK SERVICE AREAS—Continued**WATER RIGHTS—Continued**

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| 5. As a general rule, the above-developed reserved water rights apply to components of the National Park System other than national parks and national monuments, though the extent of particular reserved water rights must be determined on a case-by-case basis, involving an interpretation of 16 U.S.C. § 1 (1976) and the establishing legislation. | 558 |
| 6. The National Park Service and Fish and Wildlife Service may appropriate water to fulfill any congressionally authorized function for areas under their administration..... | 560 |

NAVIGABLE WATERS

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| 1. The requirement for a permit under sec. 404 of the Federal Water Pollution Control Act applies to the Bureau of Reclamation to the same extent as any other person, and with certain exceptions the Bureau must obtain a permit from the Corps of Engineers prior to any discharge of dredged or fill material into the navigable waters..... | 400 |
| 2. Activities "affirmatively authorized by Congress," which are excepted from sec. 10 of the Rivers and Harbors Act of 1899, are <i>not</i> excepted from sec. 404 of the Federal Water Pollution Control Act. Notwithstanding the exception of a discharge of dredged or fill material under sec. 10 of the Rivers and Harbors Act, compliance with sec. 404 is required..... | 400 |
| 3. A permit under sec. 404 of the Federal Water Pollution Control Act is required for the discharge of dredged or fill material whenever: (a) the "discharge" constitutes any addition of any pollutant to navigable waters from any discernible, confined and discrete conveyance, including the placement of fill and the building of any structure or impoundment; and (b) the "dredged material" is dredged spoil that is excavated or dredge from the waters of the United States; or (c) the "fill material" includes any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body, including any structure which requires rock, sand, dirt or other material for its construction; and (d) the discharge is made into "waters of the United States," which extend beyond those waters meeting the traditional tests of navigability to those encompassed by the broadest possible constitutional interpretation..... | 400 |

OFFICE OF HEARINGS AND APPEALS

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| 1. The Board of Land Appeals, in its adjudication of appeals to determine rights of parties to receive or preserve interests in Federal lands, has a concomitant obligation to preserve the integrity of the process, and where it appears to the Board that the administrative record of a case contains strong evidence of multiple violations of 18 U.S.C. § 1001 (1976), the Board will refer the matter with its recommendation that an investigation be initiated to determine whether criminal charges should be brought..... | 81 |
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OIL AND GAS LEASES**APPLICATIONS****Generally**

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| 1. Where an oil and gas lease offeror fails to respond within a prescribed period of time to an order to submit specific information necessary to determine whether his offer is valid, it is appropriate to reject the offer..... | 81 |
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OIL AND GAS LEASES—Continued

APPLICATIONS—Continued

Generally—Continued

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2. Where a protestant against the issuance of an oil and gas lease supports his allegations that the lease offer is not qualified with sufficient evidence to warrant further inquiry or investigation by BLM, the protest should not be summarily dismissed for failure of the protestant to make positive proof of his allegations. Instead, the protest should be adjudicated on its merits after all available information has been developed.....	81
3. The essential requirement of the simultaneous oil and gas leasing system is that all properly filed offers be afforded equal opportunity to obtain a lease. Where a system effectively excludes a lease offer from consideration, such a system is arbitrary and capricious.....	234
4. Under the Departmental regulations an offeror in a simultaneous oil and gas lease drawing must sign a statement that he is the sole party in interest, or, if not, submit the statement required by 43 CFR 3102.7. Failure to comply with the regulation requires rejection of the lease offer.....	643

Drawings

1. Established and longstanding Departmental policy relating to the administration of the simultaneous oil and gas leasing system, premised upon regulatory interpretation, is binding on all employees of the Bureau of Land Management, until such time as it is properly changed.....	234
2. The essential requirement of the simultaneous oil and gas leasing system is that all properly filed offers be afforded equal opportunity to obtain a lease. Where a system effectively excludes a lease offer from consideration, such a system is arbitrary and capricious.....	234
3. Where offers for the same parcel of land are filed by two corporations in a simultaneous oil and gas lease drawing, and where the directors of the first corporation having authority to file offers and execute leases are directors of the second with the same authority and the surrounding circumstances suggest that the corporations are interrelated, the drawing is inherently unfair and the offers are properly rejected as a prohibited multiple filing. Collusion or intent to deceive the Department need not be shown.....	374
4. "Interest in an oil and gas lease or offer." If an oil and gas lease offeror in an oral agreement gives another person "a claim or any prospective or future claim to an advantage or benefit from a lease," there would be an interest in the lease or lease offer which must be disclosed under 43 CFR 3102.7. That an offeror might raise a technical legal defense against enforcement of such an agreement in a court does not militate against there being a claim or avoid the consequence of the disclosure regulation or 43 CFR 3112.5-2 prohibiting multiple filing in drawing procedures.....	643
5. "Interest in an oil and gas lease or offer." Where affidavits submitted on appeal by an oil and gas lease offeror disclose that prior to the filing of an oil and gas lease offer the offeror orally agreed to give the person filing the offer for him either the opportunity to refuse to purchase the lease under terms and conditions that a third party would make (right of first refusal), or the opportunity to make the first offer before any	

OIL AND GAS LEASES—Continued**APPLICATIONS—Continued****Drawings—Continued**

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other offer would be accepted (first right to buy), the offeror has given the person an interest in the offer as defined in the regulations to include a prospective claim to an advantage or benefit from a lease.-----

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Filing

1. Where offers for the same parcel of land are filed by two corporations in a simultaneous oil and gas lease drawing, and where the directors of the first corporation having authority to file offers and execute leases are directors of the second with the same authority and the surrounding circumstances suggest that the corporations are interrelated, the drawing is inherently unfair and the offers are properly rejected as a prohibited multiple filing. Collusion or intent to deceive the Department need not be shown.-----

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Sole Party in Interest

1. Under the Departmental regulations an offeror in a simultaneous oil and gas lease drawing must sign a statement that he is the sole party in interest, or, if not, submit the statement required by 43 CFR 3102.7. Failure to comply with the regulation requires rejection of the lease offer.-----
2. Where a protest, with accompanying supporting evidence, alleges that the oil and gas lease offer drawn first in a simultaneous filing-drawing procedure violated the regulations because a party in interest was not disclosed and there was a multiple filing, the Bureau of Land Management should first afford the drawee an opportunity to respond to the protest before rejecting the offer based on facts alleged in the protest. The error, however, is rendered harmless where on appeal the offeror has full opportunity to make factual submissions and respond to the allegations.-----
3. "Interest in an oil and gas lease or offer." If an oil and gas lease offeror in an oral agreement gives another person "a claim or any prospective or future claim to an advantage or benefit from a lease," there would be an interest in the lease or lease offer which must be disclosed under 43 CFR 3102.7. That an offeror might raise a technical legal defense against enforcement of such an agreement in a court does not militate against there being a claim of avoid the consequence of the disclosure regulation or 43 CFR 3112.5-2 prohibiting multiple filing in drawing procedures.-----
4. "Interest in an oil and gas lease or offer." Where affidavits submitted on appeal by an oil and gas lease offeror disclose that prior to the filing of an oil and gas lease offer the offeror orally agreed to give the person filing the offer for him either the opportunity to refuse to purchase the lease under terms and conditions that a third party would make (right of first refusal), or the opportunity to make the first offer before any other offer would be accepted (first right to buy), the offeror has given the person an interest in the offer as defined in the regulations to include a prospective claim to an advantage or benefit from a lease.-----

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OIL AND GAS LEASES—Continued

FIRST-QUALIFIED APPLICANT

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1. Where a protest, with accompanying supporting evidence, alleges that the oil and gas lease offer drawn first in a simultaneous filing-drawing procedure violated the regulations because a party in interest was not disclosed and there was a multiple filing, the Bureau of Land Management should first afford the drawee an opportunity to respond to the protest before rejecting the offer based on facts alleged in the protest. The error, however, is rendered harmless where on appeal the offeror has full opportunity to make factual submissions and respond to the allegations.....

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OIL SHALE

WITHDRAWALS

1. Oil shale withdrawals administered by the Department of the Interior have reserved water rights for the purposes of investigation, examination and classification of those lands. Water is not reserved for actual oil shale development.....

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OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS

GENERALLY

1. There are no reserved water rights on the revested Oregon and California Railroad lands and the Coos Bay Wagon Road lands, the "O&C" lands.....
2. FLPMA, the Taylor Grazing Act, the O&C Act, and other statutes permit the United States to appropriate water for the diverse purposes found in the various statutes.....

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PHOSPHATE LEASES AND PERMITS

PERMITS

1. A prospecting permit which embraces land which is not "unclaimed" and "undeveloped" is a nullity and void as a conveyance of any interest in that land. Land in a mining claim remains "unclaimed" land for the purposes of M-36893 so long as the claim is not validated by discovery of a valuable locatable mineral deposit at the date of permit issuance. Surface disturbing mineral activities, associated with delineation of a mineral ore body which could reasonably be expected to disclose knowledge of an area's coal potential constitute development. The bona fide purchaser provisions of sec. 27(h)(2) of the Mineral Leasing Act do not apply to permits which embrace land that is claimed or developed.....
2. The BLM should presume the validity of mining claims or the development of mineral leases disclosed by abstracts submitted by the preference right lease applicant, and allow the applicant to pursue the remedy of private contests or, failing that, issue a notice of intent to reject the lease application where claims or development are shown, and allow the preference right lease applicant the opportunity to show, on the record, the invalidity of the claims, or lack of development, or both.....

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PUBLIC LANDS

GENERALLY

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1. Federal title to land may be lost by erosion, and land which has become submerged under water is no longer subject to disposition under the Alaska Native Allotment Act. The fact that an Alaska Native may have used, occupied, and filed an application for such land when it was dry does not prevent the loss of Federal title to that land by erosion. Neither the Alaska Statehood Act nor the Submerged Lands Act prevents the passage of title to such land to the State.....

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RECLAMATION LANDS

GENERALLY

1. Sec. 8 of the 1902 Reclamation Act, 43 U.S.C. § 372 *et seq.* (1976), prohibits the Bureau of Reclamation from claiming any reserved water rights for any reclamation project unless the terms of any project authorization subsequent to 1902 can fairly be read to provide for a reservation of water.....

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REGULATIONS

(See also Administrative Procedure.)

GENERALLY

1. The Secretary could establish general policy in right-of-way regulations which would provide specific guidelines for determining how much uncertainty about use will prevent the processing of right-of-way applications.....
2. In view of 43 U.S.C.A. § 1752(c) (West Supp. 1978), which dictates that in certain circumstances the present grazing user shall have a right of first refusal for any new lease, 43 CFR 4110.5 (43 FR 29070), must be read *in pari materia* therewith and with 43 CFR 4130.2(e) (43 FR 29072) to be construed as a valid regulation and must be interpreted not to apply where the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria.....

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INTERPRETATION

1. In view of 43 U.S.C.A. § 1752(c) (West Supp. 1978), which dictates that in certain circumstances the present grazing user shall have a right of first refusal for any new lease, 43 CFR 4110.5 (43 FR 29070), must be read *in pari materia* therewith and with 43 CFR 4130.2(e) (43 FR 29072) to be construed as a valid regulation and must be interpreted not to apply where the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria.....

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VALIDITY

1. In view of 43 U.S.C.A. § 1752(c) (West Supp. 1978), which dictates that in certain circumstances the present grazing user shall have a right of first refusal for any new lease, 43 CFR 4110.5 (43 FR 29070), must be read *in pari materia* therewith and with 43 CFR 4130.2(e) (43 FR 29072) to be construed as a valid regulation and must be interpreted not to apply where the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria.....

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RIGHTS-OF-WAY

(See also Indian Lands, Reclamation Lands.)

APPLICATIONS

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1. Given the specific facts presented by the right-of-way application, where the use of a large percentage (71%-89%) of the reservoir water is not known, the Secretary cannot make an "informed decision" on the application, as required by Title V of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743 (Oct. 21, 1976), 43 U.S.C. § 1761 *et seq.* (1976) (FLPMA), and therefore may not proceed to consider the application..... 293
2. The apparent discretion granted to the Secretary in sec. 1761 of FLPMA which states that the Secretary shall require such information "which he deems necessary" to grant a right-of-way must be interpreted in light of sec. 1764's specific mandate to submit a plan of operation, sec. 1765's specific mandate to include protective terms and conditions, and Congress reference to "the use, or intended use" of the right-of-way. Therefore, information about the intended use—as opposed to possible uses—of the water is necessary to the Secretary's decision whether to grant the application, under the circumstances presented by this case..... 293
3. The Secretary could establish general policy in right-of-way regulations which would provide specific guidelines for determining how much uncertainty about use will prevent the processing of right-of-way applications..... 293

CONDITIONS AND LIMITATIONS

1. The Secretary could establish general policy in right-of-way regulations which would provide specific guidelines for determining how much uncertainty about use will prevent the processing of right-of-way applications..... 293

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

1. Given the specific facts presented by the right-of-way application, where the use of a large percentage (71%-89%) of the reservoir water is not known, the Secretary cannot make an "informed decision" on the application, as required by Title V of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743 (Oct. 21, 1976), 43 U.S.C. § 1761 *et seq.* (1976) (FLPMA), and therefore may not proceed to consider the application..... 293
2. The apparent discretion granted to the Secretary in sec. 1761 of FLPMA which states that the Secretary shall require such information "which he deems necessary" to grant a right-of-way must be interpreted in light of sec. 1764's specific mandate to submit a plan of operation, sec. 1765's specific mandate to include protective terms and conditions, and Congress reference to "the use, or intended use" of the right-of-way. Therefore, information about the intended use—as opposed to possible uses—of the water is necessary to the Secretary's decision whether to grant the application, under the circumstances presented by this case..... 293

RULES OF PRACTICE

(See also Appeals, Contests and Protests, Contracts, Hearings, Indian Probate.)

APPEALS**Burden of Proof**

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1. In review proceedings of notices of violation and cessation orders, the burden of going forward to establish a prima facie case rests with OSM and the ultimate burden of persuasion rests with the applicant for review... 437
2. An appellant will be held to have failed to sustain its burden of proof and the appeal will be denied where appellant's case is submitted on the record without a hearing and the record consists only of claim letters and pleadings alleging that the contracting officer's findings of fact and decision are erroneous in certain respects. Disputed allegations do not constitute evidence and cannot be accepted as proof of facts..... 475

Motions

1. A claim by a concessioner under a National Park Service Contract is dismissed as beyond the purview of the Board's jurisdiction where the contract contains no disputes clause and by its express terms the Contract Disputes Act of 1978 is not applicable to the claim asserted..... 197
2. A contractor may not proceed under the provisions of the Contract Disputes Act of 1978 where the appeal is from a final decision of the contracting officer rendered and received by the appellant prior to the effective date of the Act..... 520
3. The appellant's motion for reconsideration provides no reason for overturning the Board's principal decision which dismissed the subject appeals for lack of jurisdiction. The Board, having found significant current precedents consistent with the view that the effective date of the Contract Disputes Act of 1978 was Mar. 1, 1979, and that claims appealed to the Board prior to that date were not pending then before the Contracting Officer, finds those precedents controlling without analysis of all matters argued in appellant's brief..... 654

Reconsideration

1. When an appellant files a timely motion for reconsideration asking that an equitable adjustment be increased, the effect is to prevent finality from attaching to the original decision and the Board has jurisdiction to consider a Government response asking that the equitable allowance be reduced, even though the response was not filed within the 30-day period allowed for initial filing of a motion for reconsideration... 125
2. When arguments advanced in a motion for reconsideration convince the Board that the formula used in determining an equitable adjustment was not the most accurate method but where neither party submits a better method, the Board will vacate its original finding regarding the equitable adjustment and make a recomputation based on the evidence of record..... 125
3. The appellant's motion for reconsideration provides no reason for overturning the Board's principal decision which dismissed the subject appeals for lack of jurisdiction. The Board, having found significant current precedents consistent with the view that the effective date of the Contract Disputes Act of 1978 was Mar. 1, 1979, and that claims appealed to the Board prior to that date were not pending then before the Contracting Officer, finds those precedents controlling without analysis of all matters argued in appellant's brief..... 654

RULES OF PRACTICE—Continued

APPEALS—Continued

Standing to Appeal

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1. This Board approves the rule that a surety may prosecute and appeal in its own name when it enters into a takeover agreement to complete performance of a defaulted contract, but in the absence of such an agreement, the surety may appeal under the defaulted contract only in a representative capacity with the consent of its principal, the principal contractor on the defaulted contract..... 206

Timely Filing

1. When an appellant files a timely motion for reconsideration asking that an equitable adjustment be increased, the effect is to prevent finality from attaching to the original decision and the Board has jurisdiction to consider a Government response asking that the equitable allowance be reduced, even though the response was not filed within the 30-day period allowed for initial filing of a motion for reconsideration..... 125

EVIDENCE

1. Where the evidence as to specific trespass indicates that of a number of cattle counted some were located on private intermingled land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands..... 133
2. An appellant will be held to have failed to sustain its burden of proof and the appeal will be denied where appellant's case is submitted on the record without a hearing and the record consists only of claim letters and pleadings alleging that the contracting officer's findings of fact and decision are erroneous in certain respects. Disputed allegations do not constitute evidence and cannot be accepted as proof of facts..... 475

GOVERNMENT CONTESTS

1. Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 *et seq.* Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an administrative law judge, who will proceed to schedule a hearing, at which the applicant may produce evidence to establish entitlement to his allotment..... 279
2. Where the Bureau of Land Management (BLM) determines that an Alaska Native allotment application should be rejected in part because the Native did not use all of the land applied for, the BLM shall initiate a contest proceeding pursuant to 43 CFR 4.451 *et seq.*..... 342
3. Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the

RULES OF PRACTICE—Continued

GOVERNMENT CONTESTS—Continued

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Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the determination to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not, prior to its appeal, been afforded notice of the election, it should be afforded an opportunity to make such election.....

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HEARINGS

1. Alaska Natives who allege substantial use and occupancy of vacant, unappropriated, and unreserved public land in Alaska for a period of at least 5 years pursuant to the Act of May 17, 1906, *as amended*, 43 U.S.C. §§ 270-1 to 270-3 (1970) and the regulations at 43 CFR Subpart 2561 are entitled to notice and an opportunity for a hearing prior to rejection of their application. Such notice shall specify the reasons for the proposed rejection. Claimant shall have an opportunity to present evidence and testimony of favorable witnesses at a hearing before the trier of fact prior to a decision.....

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PRIVATE CONTESTS

1. Under the "functional" standard to determine administrative standing set forth in *Koniag, Inc. v. Andrus*, 580 F. 2d 601 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.....
2. "Person." A State is a "person" within the meaning of the Department's private contest regulations.....
3. Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the determination to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not, prior to its appeal, been afforded notice of the election, it should be afforded an opportunity to make such election.....

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RULES OF PRACTICE—Continued

PROTESTS

Page

1. Where a protest, with accompanying supporting evidence, alleges that the oil and gas lease offer drawn first in a simultaneous filing-drawing procedure violated the regulations because a party in interest was not disclosed and there was a multiple filing, the Bureau of Land Management should first afford the drawee an opportunity to respond to the protest before rejecting the offer based on facts alleged in the protest. The error, however, is rendered harmless where on appeal the offeror has full opportunity to make factual submissions and respond to the allegations.....

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SETTLEMENTS ON PUBLIC LANDS

1. A Native allotment applicant, who was 5 years old at the time when the land was withdrawn from all forms of appropriation, is properly deemed to be incapable as a matter of law of having exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently the allotment application is properly rejected.....
2. An allotment right is personal to one who has complied with the laws and regulations. An applicant for a Native allotment may not rely or tack on use and occupancy of the land by his ancestors to establish his right.....

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STATE SELECTIONS

1. Where the State is a party to decisions by the Bureau of Land Management and the State's selection applications were rejected by those decisions, under 43 CFR 4.410, the State has standing to appeal those decisions to the Board of Land Appeals.....
2. The Alaska Native Claims Settlement Act extinguished aboriginal occupancy claims of Alaska Natives; such claims cannot serve as a bar to a State selection, nor preclude the State from challenging Native allotment applications conflicting with its selection.....
3. Under the "functional" standard to determine administrative standing set forth in *Koniag, Inc. v. Andrus*, 580 F. 2d 601 (D.C. Cir. 1878), *cert. denied*, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.....

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STATUTORY CONSTRUCTION

GENERALLY

1. When interpreting Federal agreements and statutes pertaining to Indian Affairs, one must consider the legislative history, as well as surrounding circumstances and subsequent administrative practices to determine what the parties intended, and in particular, what the Indians understood the agreement to mean. Doubtful expressions are to be resolved in the Indians' favor.....
2. Congressional intent to modify or abrogate Indian property rights must be clear and cannot be lightly inferred.....

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STATUTORY CONSTRUCTION—Continued

GENERALLY—Continued

Page

3. Sec. 25 of the Act of Apr. 21, 1904 (33 Stat. 189, 224), which authorized the application of the 1902 Reclamation Act to the Fort Yuma and Colorado River Reservations, and which provided for the allotment and sale of surplus irrigable lands on those reservations, was unrelated to and was not intended to effect the conditional cession provided for in the 1893 agreement and the 1894 ratifying statute.-----

3

ADMINISTRATIVE CONSTRUCTION

1. In determining whether interpretation of a statute should be given prospective effect, some of the factors to be considered are whether the statute is easily susceptible to more than one interpretation; whether the interpretation being overruled has been followed since enactment of the statute; the nature of the reliance placed on the precedent by the parties; the purpose of the statute or rule in light of public policy; the harm to the parties who have relied on the precedent to their detriment; and the harm either to the Government or the public purpose.-----

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SUBMERGED LANDS

1. Federal title to land may be lost by erosion, and land which has become submerged under water is no longer subject to disposition under the Alaska Native Allotment Act. The fact that an Alaska Native may have used, occupied, and filed an application for such land when it was dry does not prevent the loss of Federal title to that land by erosion. Neither the Alaska Statehood Act nor the Submerged Lands Act prevents the passage of title to such land to the State.-----

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SUBMERGED LANDS ACT

GENERALLY

1. Where submerged lands were included in a withdrawal order in Alaska, which was in effect at the time the State entered the Union, even though such submerged lands were not specifically described in the withdrawal order, such submerged lands would not pass to the State at statehood pursuant to sec. 5(a) of the Submerged Lands Act.-----
2. The subsequent revocation of a withdrawal of submerged lands which prevented the State from acquiring title to such lands at statehood pursuant to sec. 5(a) of the Submerged Lands Act, has no effect on the ownership of the lands contained in the withdrawal.-----
3. Where the coastal submerged lands in the Arctic National Wildlife Refuge were segregated by an application for a withdrawal filed by the Fish and Wildlife Service in Jan. 1958, 1 year before Alaska statehood, such application operated as an express retention of the lands at statehood under the Submerged Lands Act, and prevented passage of title of the coastal submerged lands to the State.-----
4. Federal title to land may be lost by erosion, and land which has become submerged under water is no longer subject to disposition under the Alaska Native Allotment Act. The fact that an Alaska Native may have used, occupied, and filed an application for such land when it was dry does not prevent the loss of Federal title to that land by erosion. Neither the Alaska Statehood Act nor the Submerged Lands Act prevents the passage of title to such land to the State.-----

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SUBMERGED LANDS ACT—Continued

GENERALLY—Continued

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5. The Board adopts the Solicitor's conclusion that Public Land Order No. 82 (Jan. 22, 1943) (8 FR 1599 (Feb. 4, 1943)) constituted an express retention for the United States of submerged lands when Alaska was admitted to the Union, and title to the submerged lands withdrawn by PLO No. 82 did not pass to the State of Alaska with statehood---	381
6. Regulations in 43 CFR 2650.5-1(b) deal explicitly with chargeability of acreage and implicitly with land title, establishing two categories of submerged lands not required to be selected and charged: those underlying navigable waters, and those underlying nonnavigable waters of one-half section or more-----	381
7. Under regulations in 43 CFR 2650.5-1(b), Federal ownership of submerged lands does not require all such lands to be charged against a Native corporation's acreage entitlement-----	381

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

ABATEMENT

1. A refusal to grant an extension of time for abatement is not necessarily an abuse of discretion when the request for an extension was made after the abatement time had expired-----	675
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ADMINISTRATIVE PROCEDURE

Generally

1. An administrative law judge may raise questions which go to the authority of the Department under the Act even if the parties fail to raise those questions-----	321
2. If a party objects to any ruling of or action taken by an administrative law judge it should do so in a manner that the administrative law judge can reconsider his action in light of that objection-----	321
3. It is imperative both to the just implementation of this Act and to the proper functioning of administrative review within the Department that parties cooperate with the administrative law judge's conduct of the proceeding and with his requests-----	322
4. In a case on appeal, the Board bases its deliberations on the record before it-----	369
5. Where the applicant for review bases his defense upon the assertion that the amount of coal removed or to be removed is less than that provided by law to constitute surface coal mining, he must prove such an assertion-----	370
6. In review proceedings of notices of violation and cessation orders, the burden of going forward to establish a prima facie case rests with OSM and the ultimate burden of persuasion rests with the applicant for review-----	437

Findings

1. The administrative law judge may frame findings of fact in any of a number of acceptable ways, but, however they are arrived at, findings must be sufficiently comprehensive and pertinent to form a basis for decision when measured against the evidence-----	201
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SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

ADMINISTRATIVE PROCEDURE—Continued

Findings—Continued

Page

2. Except in cases governed by 43 CFR 4.1187(e) or 4.1266(b)(7)(ii), a written decision or a written order confirming a ruling from the bench constitutes the initial decision. The written decision or order incorporating the ruling from the bench must comply with 43 CFR 4.1127. The only exception to this rule is when the administrative law judge both specifically states that a ruling from the bench constitutes his initial decision and fully complies with the requirements of 43 CFR 4.1127 in that oral ruling.-----
3. In review proceedings of cessation orders issued pursuant to sec. 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977, there must be a determination whether the condition, practice, or violation which is the basis for the order is one which creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.-----

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APPLICABILITY

Generally

1. Where excavation work has taken place and coal exposed, but no coal removed, and the landowner's intent is to create homesites and not to remove coal unless permission to do so is received from the State, the Office of Surface Mining Reclamation and Enforcement lacks jurisdiction over the land.-----

550

Enforcement Provisions

1. The enforcement provisions of the Act and the initial Federal regulatory program are not avoided by the failure of a person to obtain a State permit before conducting surface coal mining and reclamation operations regulated by a State.-----

487

Postmining Land Use

1. Excavation for the purpose of obtaining coal is an activity which may be subject to regulation under the Act, even though that activity may be incidental to a postmining land use plan.-----

486

APPEALS

Effect of

1. Although, when a matter is appealed to the Board, OSM cannot take further action in the matter except to advise the Board whether the requested relief should or should not be granted, OSM can at any time move the Board to take what OSM feels is appropriate action.-----

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ATTORNEYS' FEES

Bad Faith

1. An award of costs and expenses including attorneys' fees may be awarded to a permittee from OSM only if the permittee establishes that OSM took enforcement action in bad faith and for the purpose of harassing or embarrassing the permittee.-----

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SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued**BACKFILLING AND GRADING REQUIREMENTS****Previously-mined Lands**

Page

1. The backfilling and grading requirements of 30 CFR 715.14 apply only to lands which are used, disturbed, or redisturbed in connection with or to facilitate mining or to comply with the requirements of the Act or Federal interim regulations, and do not apply to previously mined lands on which no adverse physical impact results from surface coal mining and reclamation operations conducted after the effective date of the Federal initial performance requirements..... 251

CESSATION ORDERS

1. A cessation order is not properly issued under sec. 521(a)(2) of the Act when there is no suggestion in the record that the cited violation was creating an imminent danger to public health or safety or was causing or could reasonably be expected to cause significant, imminent environmental harm..... 675

CIVIL PENALTIES**Generally**

1. During the initial regulatory program a person may be assessed a civil penalty under 30 CFR 723.1 for violations of a permit condition, a regulation, or a provision of Title V of the Act even though he does not hold a permit from the State regulatory authority..... 322

Hearings Procedure

1. The filing of an application for review of a notice of violation does not suspend the running of the period within which a petition for review of a proposed assessment of a civil penalty must be filed..... 221

ENVIRONMENTAL HARM

1. In review proceedings of cessation orders issued pursuant to sec. 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977, there must be a determination whether the condition, practice, or violation which is the basis for the order is one which creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources..... 486
2. A cessation order is not properly issued under sec. 521(a)(2) of the Act when there is no suggestion in the record that the cited violation was creating an imminent danger to public health or safety or was causing or could reasonably be expected to cause significant, imminent environmental harm..... 675

EVIDENCE

1. Where the evidence presented by OSM in support of a cited violation of the initial regulatory program performance standards is that the inspector relied on representations made to him in writing the violation, such evidence must be sufficient to withstand challenges to the substance of the representations made and to the authority to bind the permittee of the individual making the representations..... 724

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

HEARINGS

Page

1. Any objections to the location of a minesite review hearing must be made before or at the time of the minesite hearing-----

INITIAL REGULATORY PROGRAM

Generally

1. The Secretary of the Interior has interpreted the Surface Mining Control and Reclamation Act of 1977 through his duly promulgated interim program regulations to exclude sec. 521(a)(1) of the Act from having effect during the interim regulatory program----- 241
2. The definition of "permittee" adopted by the Secretary for the initial regulatory program in 30 CFR 700.5 includes those persons who, through ignorance or dishonesty, fail to obtain a permit before engaging in activities regulated by a state----- 322
3. When an interim regulatory provision is ambiguous when applied to a particular operation, and its intended meaning is not clarified by reference to the interim regulatory provisions as a whole and other pertinent interpretive materials, that provision may be construed in favor of the entity seeking relief from its application----- 336
4. "Permittee." The definition of "permittee" adopted by the Secretary for the initial regulatory program in 30 CFR 700.5 includes those persons who fail to obtain a State permit before conducting surface coal mining and reclamation operations regulated by a State----- 486

Performance Requirements

Applicability

1. The extraction of coal as an incidental part of privately financed construction is not an activity excluded, as such, from coverage by the performance requirements of the initial regulatory program----- 370

State Regulation

1. Compliance with State mining permit conditions does not excuse non-compliance with the initial Federal performance requirements----- 250
2. Regardless of whether a permittee has a mining and reclamation plan approved by the State regulatory authority before the interim regulations became effective, that plan must meet the requirements of the regulations----- 446

State Regulation

1. The initial Federal regulatory program is not applicable to a surface coal mining operation which is located on State land and which is not subject to State regulation within the scope of any of the initial performance standards----- 266

INSPECTIONS

1. In the absence of extraordinary circumstances, the Board is unwilling to consider an entry made without prior presentation of credentials by an inspector to be in compliance with the requirements of 30 CFR 721.12(a)----- 523

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

PUBLIC HEALTH AND SAFETY

Page

1. A cessation order is not properly issued under sec. 521(a)(2) of the Act when there is no suggestion in the record that the cited violation was creating an imminent danger to public health or safety or was causing or could reasonably be expected to cause significant, imminent environmental harm.....

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ROADS

Maintenance

1. Haul roads shall be maintained, in accordance with 30 CFR 717.17(j), by means that will prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area, to the extent possible using the best technology currently available.....
2. In determining whether there is a violation of the haul road maintenance requirements of 30 CFR 717.17(j)(3)(i), the relevant inquiry is not whether the road's condition constituted failure to maintain it in view of its use, but whether its condition demonstrated a failure to maintain it in a manner that would prevent adverse impacts on the hydrologic balance in general and additional contributions of suspended solids to streamflow or to runoff outside the permit area in particular..

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SIGNS AND MARKERS

1. While the initial Federal regulatory program requires that the perimeter of the permit area be clearly marked, there is no definition of permit area applicable during such program; therefore, an interpretation of 30 CFR 715.12(c) that is consonant with the spirit and purposes of the Act will be upheld.....
2. Signs and markers, whenever required, must be durable and easily recognized.....

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SPOIL AND MINE WASTES

Valley and Head-of-Hollow Fills

1. The fact that an operator may have begun constructing a fill which obstructed, interrupted, or encroached upon a natural drainage channel or natural stream channel prior to May 3, 1978, may not excuse the operator from complying with Federal requirements for a valley fill when he subsequently continues construction of the valley fill.....

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STATE REGULATION

1. Regardless of whether a permittee has a mining and reclamation plan approved by the State regulatory authority before the interim regulations became effective, that plan must meet the requirements of the regulations.....
2. In order for the regulatory authority's approval of a permittee's use of alternative materials in place of topsoil to be timely, it must be given before alternative material is substituted for topsoil.....

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SURFACE OWNER CONSENT

1. The Secretary may, in computing the fair market value of coal to be leased competitively under privately owned surface, assume a limited surface owner consent cost, based on losses and costs to the surface estate and operation and similar evaluations, regardless of the actual price paid or the amount which a surface owner could otherwise demand for consent.....

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SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued**SURFACE OWNER CONSENT—Continued**

Page

2. Assumption of a limited surface owner consent cost to be used in place of actual cost in the computation of fair market value of coal to be leased competitively is necessary to ensure receipt of fair market value by the public as required by 30 U.S.C. § 201(a) (1976)----- 28
3. In the exercise of his discretion to lease under the Mineral Leasing Act, the Secretary has authority to decline to issue a coal lease where surface owner consent costs prevent the public from realizing a fair return on the value of the coal----- 28

TOPSOIL**Generally**

1. A showing of contamination is not a necessary requirement in establishing a topsoil removal violation pursuant to 30 CFR 715.16. Protection of topsoil from contamination is merely a reason for the removal requirement, not a requirement itself----- 724

Alternative Materials

1. Even when the regulatory authority has approved the use of alternative materials in place of topsoil, the alternative materials must be handled in accordance with 30 CFR 715.16(a)(4) (iii)----- 446
2. In order for the regulatory authority's approval of a permittee's use of alternative materials in place of topsoil to be timely, it must be given before alternative material is substituted for topsoil----- 446
3. An operator must obtain approval from a State regulatory authority before using alternative materials instead of removing, segregating, and redistributing topsoil----- 483

Handling

1. Absent express approval of an alternative plan by a regulatory authority in the manner provided by law, 30 CFR 715.16 requires no less than all the available topsoil to be salvaged----- 656

VARIANCES

1. Any exemption from the requirements of 30 CFR 715.17(a), concerning sedimentation ponds, must be sought from the appropriate regulatory authority----- 675

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS**Discharges from Disturbed Areas**

1. Discharges from any portion of a permitted area that is disturbed in the course of the permittee's mining operations must comply with the effluent limitations contained in 30 CFR 715.17(a) of the Department's initial regulatory program----- 38

Disturbed Areas**Sedimentation Ponds**

1. A sedimentation pond is a "disturbed area," as that term is defined for the purpose of 30 CFR 715.17(a) of the Department's initial regulatory program, when any portion of the permitted area which drains into the sedimentation pond has been disturbed by the permittee other than by the construction of other sedimentation ponds, roads or diversion ditches----- 38

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS—Continued

Sedimentation Ponds

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| 1. Any exemption from the requirements of 30 CFR 715.17(a), concerning sedimentation ponds, must be sought from the appropriate regulatory authority..... | 675 |
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WORDS AND PHRASES

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| 1. "Permittee." The definition of "permittee" adopted by the Secretary for the initial regulatory program in 30 CFR 700.5 includes those persons who fail to obtain a State permit before conducting surface coal mining and reclamation operations regulated by a State..... | 486 |
| 2. "Topsoil." For purposes of the topsoil removal requirements of 30 CFR 715.16(a), topsoil is either all the A horizon or the A horizon plus unconsolidated material to a depth of 6 inches or all unconsolidated material where less than 6 inches of material exists..... | 483 |

TAYLOR GRAZING ACT

GENERALLY

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| 1. The Taylor Grazing Act created no reserved water rights..... | 557 |
| 2. The management programs mandated by Congress in such Acts as the Taylor Grazing Act and FLPMA require the appropriation of water by the United States in order to assure the success of the programs and carry out the objectives established by Congress..... | 559 |
| 3. FLPMA, the Taylor Grazing Act, the O&C Act, and other statutes permit the United States to appropriate water for the diverse purposes found in the various statutes..... | 560 |

TRESPASS

MEASURE OF DAMAGES

- | | |
|--|-----|
| 1. Where the evidence as to specific trespass indicates that of the number of cattle counted some were located on private intermingled land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands..... | 133 |
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WATER AND WATER RIGHTS

GENERALLY

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| 1. By acquisition of the lands now comprising the Western States, the United States acquired all rights appurtenant to such lands, including water rights..... | 553 |
| 2. Under the Property Clause, Congress has the power to control the disposition and use of water on, under, or appurtenant to original public domain lands, and it is not lightly inferred that this power has been exercised..... | 553 |
| 3. To the extent Congress has not clearly granted authority to the States over waters which are in, on, under or appurtenant to Federal lands comprising the public domain and reserved public domain, the Federal Government maintains its sovereign rights in such waters and may put them to use irrespective of State law..... | 553 |

WATER AND WATER RIGHTS—Continued

GENERALLY—Continued

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4. Federal control over the disposition and use of water in, on, under or appurtenant to Federal land ultimately rests on the Supremacy Clause, which permits the Federal Government to exercise its constitutional prerogatives without regard to State law..... 553
5. The admission of a State into the Union and the "equal footing" doctrine did not divest the United States of its plenary control over waters which are in, on, under or appurtenant to Federal lands comprising the public domain and reserved public domain..... 553
6. Federal control over its needed water rights, unhampered by compliance with procedural and substantive State law, is supported by the Supremacy Clause and the doctrine that Federal activities are amuned from State regulation unless there is specific congressional action providing for State control..... 553
7. Originally, the common law riparian rules of nature flow applied to the public lands; these riparian rules could be changed by State legislatures only if such changes did not impair the right of the United States to the continued flow of water bordering its lands needed for the beneficial use of Government property, or if the Congress expressly consented..... 553
8. Three Federal statutes provide the general basis for State regulatory authority over water rights: Act of July 26, 1866, § 9, 14 Stat. 253; Act of July 9, 1870, § 17, 16 Stat. 218, 43 U.S.C. § 661 (1976); and the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 *et seq.* (1976)..... 553
9. The Act of July 26, 1866 § 9, 14 Stat. 253, and the Act of July 9, 1870, § 17, 16 Stat. 218, 43 U.S.C. § 661 (1976), sanctioned private possessory rights to water on the public lands asserted under local laws and customs; Congress in effect waived its proprietary and riparian rights to water on the public domain to the extent water is appropriated by members of the public under State law in conformance with the grant of authority found in these two Acts, and Congress thereby confined the assertion of inchoate Federal water rights to unappropriated waters that exist at any point in time..... 553
10. Supreme Court *dicta* concerning the effect of the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 *et seq.* (1976), on Federal water rights are somewhat at war with each other; but Supreme Court decisions upholding Federal reserved water rights must mean that the Desert Land Act of 1877 did not divest the United States of its authority, as sovereign, to use the unappropriated waters on the public lands for governmental purposes..... 554
11. Since the Federal Government has never granted away its right to make use of unappropriated waters on Federal lands, the United States retains the power to vest in itself water rights in unappropriated waters on, in, under, or appurtenant to Federal lands, and it may exercise such power independent of substantive State law..... 554
12. For purposes of the Executive Order of Apr. 17, 1926, the term "spring" means a discrete natural flow of water emerging from the earth at a reasonably distinct location, whether or not such flow constitutes a source of or is tributary to a water course, pond, or other body of surface water. The term "waterhole" means a dip or hole in the earth's surface where surface or groundwater collects and which may serve as a watering place for man or animals..... 555

WATER AND WATER RIGHTS—Continued**GENERALLY—Continued**

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13. The Executive Order withdrew, as of Apr. 17, 1926, all lands containing important springs and waterholes that existed as of that date on unappropriated, unreserved public lands.....	555
14. The Executive Order does not affect a valid, private right to use some or all of the waters of such a source that vested under the applicable State laws, custom or usage prior to Apr. 17, 1926.....	555
15. The Executive Order does not withdraw artificially developed sources of water or manmade structures for collection of water on the public domain. However, any interest held in those artificially developed or constructed sources or structures passes to the United States upon abandonment by the developer or his successor in interest by virtue of the United States' ownership of the land.....	555
16. The Executive Order withdraws, by operation of law, lands which become of the character contemplated in the Order subsequent to the date of the Order; i.e., vacant, unappropriated, unreserved public lands upon which springs or waterholes come into existence after Apr. 17, 1926...	556
17. The Executive Order withdraws, by operation of law, any vacant, unappropriated, unreserved public land upon which is located a spring or waterhole and for which a private vested right to use all of such water under applicable State law, custom and usage has previously existed upon abandonment or forfeiture of that State water right under the terms of the applicable State law, custom or usage.....	556
18. The Executive Order withdraws all lands containing springs or waterholes as defined and subject to the limitations set forth above, regardless of whether the water source has been the subject of an official finding as to its existence and location.....	556
19. The priority date for the public right to use the waters of a spring or waterhole withdrawn under the Order is Apr. 17, 1926, for all public springs and waterholes existing on that date. Those public springs and waterholes that naturally come into existence at a later date are withdrawn when they come into existence.....	556
20. Any action taken by private party who did not have a vested State water right prior to Apr. 17, 1926, or had not received appropriate permission from the United States subsequent to that date to make use of the public waterhole or spring withdrawn by the Order is a nullity and of no force and effect. Any entry onto the reserved land for such purpose constitutes a trespass.....	556
21. The purposes for which water is reserved under the 1926 Order are (a) stockwatering, (b) human consumption, (c) agriculture and irrigation, including sustaining fish, wildlife and plants as a food and forage source, and (d) flood, soil, fire and erosion control.....	556
22. Because the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 <i>et seq.</i> (1976), repealed both authorizing statutes under which the Apr. 17, 1926, Order was issued, springs and waterholes on the public domain coming into existence after Oct. 21, 1976, are not withdrawn by the Apr. 17, 1926, Order but must be withdrawn under other, still existing legislative authority to be effective.....	556

WATER AND WATER RIGHTS—Continued**GENERALLY—Continued**

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| 23. Sec. 701(g) of FLPMA, 43 U.S.C. § 1701 notes (1976), maintains the status quo in the relationship between the States and the Federal Government on water, and allows for (a) the continued appropriation of unappropriated nonnavigable waters on the public domain by private persons pursuant to State law as authorized by the Desert Land Act; (b) the right of the United States to use unappropriated water for the congressionally recognized and mandated purposes set forth in legislation providing for the management of the public domain; and (c) application by the United States to secure water rights pursuant to State law for these purposes----- | 560 |
| 24. The National Park Service and Fish and Wildlife Service may appropriate water to fulfill any congressionally authorized function for areas under their administration----- | 560 |

FEDERAL APPROPRIATION

- | | |
|--|-----|
| 1. The United States has the right to appropriate water on its own property for congressionally authorized uses, which right arises from actual use of unappropriated water by the United States to carry out congressionally authorized management objectives on Federal lands, but may not predate in priority the date action is taken leading to an actual use, and it may not adversely affect other rights previously established under State law----- | 554 |
| 2. The appropriation of water by the Federal Government for authorized Federal purposes cannot be strictly limited by State substantive law; for example, by what State law says is a "diversion" of water or a "beneficial use" for which water can be appropriated----- | 554 |
| 3. The management program mandated by Congress in such Acts as the Taylor Grazing Act and FLPMA require the appropriation of water by the United States in order to assure the success of the programs and carry out the objectives established by Congress----- | 559 |
| 4. FLPMA, the Taylor Grazing Act, the O&C Act, and other statutes permit the United States to appropriate water for the diverse purposes found in the various statutes----- | 560 |
| 5. FLPMA authorizes the BLM to appropriate water for such uses as fish and wildlife maintenance and protection, scenic value preservation, and human consumption, and protection of areas of critical environmental concern----- | 560 |

FEDERALLY RESERVED WATER RIGHTS

- | | |
|--|-----|
| 1. When the Federal Government withdraws land from the public domain and reserves it for a Federal purpose, by implication, it reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation, and the reserved water right vests on the date of the reservation and is superior to the rights of future appropriators----- | 554 |
| 2. The intent to reserve water is inferred if previously unappropriated water is necessary to accomplish the purposes for which the land reservation is created, but where water is only valuable for a secondary use of the reservation there arises a contrary inference that the United States would acquire water in the same manner as other public or private appropriators----- | 557 |

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FEDERALLY RESERVED WATER RIGHTS—Continued

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3. The priority date of the Federal reserved water right for purposes of determining seniority of water rights relative to those obtained under State or other Federal law is the date of the Federal reservation or withdrawal action initiated toward a reservation.....	555
4. The volume and scope of particular reserved water rights are Federal questions calling for the application of Federal law; State law requirements such as notice of application to beneficial use and restrictions on beneficial use are not applicable to reserved water rights.....	555
5. Reserved water rights encompass both existing and reasonably foreseeable future water uses necessary to fulfill the purposes of the reservation.....	555
6. While persuasive arguments can be made for and against the application of reserved water rights on acquired lands, it is the policy of this Department to obtain water rights for acquired lands through means other than the assertion of a reserved water right.....	555
7. The Act of June 16, 1934, 30 U.S.C. § 229a (1976), creates a reserved right when an oil and gas prospecting permittee or lessee strikes water "of such quality and quantity as to be valuable and usable at a reasonable cost for agriculture, domestic, or other purposes" as found by the Secretary.....	556
8. The withdrawals of lands for powersites under 43 U.S.C. § 141 (1970) do not carry with them reserved water rights for purposes under the administration of the Department of the Interior, simply because of their reservation as a powersite.....	557
9. Water sources located within stock driveways and reserved pursuant to sec. 10 of the Act of Dec. 29, 1916, 43 U.S.C. § 300 (1970), are reserved to the extent necessary to provide for stockwatering during the process of moving livestock through these reserved access corridors.....	557
10. Oil shale withdrawals administered by the Department of the Interior have reserved water rights for the purposes of investigation, examination and classification of those lands. Water is not reserved for actual oil shale development.....	557
11. The Taylor Grazing Act created no reserved water rights.....	557
12. There are no reserved water rights on the revested Oregon and California Railroad lands and the Coos Bay Wagon Road lands, the "O&C" lands.....	557
13. Classification of lands under the Classification and Multiple Use Act of 1964, 43 U.S.C. § 1411 <i>et seq.</i> (1970), does not create reserved water rights.....	557
14. Designation of lands as sanctuaries for wild, free-roaming horses and burros under the Act of Dec. 15, 1971, 16 U.S.C. § 1333 <i>et seq.</i> (1976), does not reserve water for the purposes of wild horse and burro drinking.....	557
15. Rivers administered by BLM that have been designated as components of the Wild and Scenic Rivers System under 16 U.S.C. §§ 1271-1287 (1976) carry with them reserved water rights sufficient to fulfill the purposes of the Act.....	557
16. The Federal Land Policy and Management Act, 43 U.S.C. § 1701 <i>et seq.</i> (1976), does not establish any reserved rights in BLM lands.....	557

WATER AND WATER RIGHTS—Continued

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17. Sec. 8 of the 1902 Reclamation Act, 43 U.S.C. § 372 *et seq.* (1976) prohibits the Bureau of Reclamation from claiming any reserved water rights for any reclamation project unless the terms of any project authorization subsequent to 1902 can fairly be read to provide for a reservation of water..... 558
18. The particular reserved water rights for national park and national monument areas include water required for scenic, natural, and historic conservation uses; wildlife conservation uses; sustained public enjoyment uses; and National Park Service personnel uses; all of which are intimately related to the fundamental purpose for park and monument reservation, as articulated in 16 U.S.C. § 1 (1976)..... 558
19. Among other reserved water rights for national parks and national monuments, 16 U.S.C. § 1 (1976) encompasses reserved water rights for concession uses to provide sustained public enjoyment and reserved water rights for water-borne public enjoyment and recreation..... 558
20. Congress has taken no action subsequent to the National Park Service Organic Act of Aug. 25, 1916, 39 Stat. 535, 16 U.S.C. § 1 (1976), to negate the implied intent contained in the Organic Act that all unappropriated waters necessary to fulfill the purposes of park areas are reserved as of the date of the enabling legislation..... 558
21. The discretionary authority contained in the Act of Aug. 7, 1946, 60 Stat. 885, 16 U.S.C. § 17j-2(g) (1976), authorizing the National Park Service to acquire water rights in accordance with local laws, is not inconsistent with the assertion of the reserved water rights principle and is readily distinguishable from Acts requiring deference to State water law..... 558
22. As a general rule, the above-developed reserved water rights apply to components of the National Park System other than national parks and national monuments, though the extent of particular reserved water rights must be determined on a case-by-case basis, involving an interpretation of 16 U.S.C. § 1 (1976) and the establishing legislation..... 558
23. Executive branch reservations for native bird preserves, migratory bird refuges, game ranges, fish hatcheries, elk refugees and similar refuges and preserves reserved sufficient water needed for the maintenance of the species (*e.g.*, ecosystem food supply, breeding habitat, fire protection, domestic needs of Fish and Wildlife Service personnel) mentioned in the executive orders establishing the individual reservations..... 558
24. Executive branch refuge reservations superimposed on areas previously withdrawn for powersites, reclamation or other purposes obtain reserved water rights necessary to fulfill the specific purposes for the refuge reservations..... 559
25. Wildlife Refuge uses authorized by the Refuge Receipts Act of 1935, 49 Stat. 383, 16 U.S.C. § 715s(f) (1976); the Refuge Recreation Act of 1962, 76 Stat. 653, 16 U.S.C. §§ 460k-460k-4 (1976); and the National Wildlife Refuge Administration Act of 1966, 80 Stat. 927, 16 U.S.C. §§ 668dd-668ee (1976), such as public recreational uses, do not obtain reserved water rights under existing precedent..... 559
26. The Wild and Scenic Rivers Act, 82 Stat. 917, 16 U.S.C. § 1284(c) (1976), contains an express, though negatively phrased, assertion of Federal reserved water rights..... 559

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27. The extent of the water reserved for wild and scenic rivers is the amount of unappropriated water necessary to protect the particular aesthetic, recreational, scientific, biotic or historical features which led to the river's inclusion as a component of the National Wild and Scenic Rivers System, and to provide public enjoyment of such values..... 559
28. Designation of wild and scenic rivers does not automatically reserve the entire unappropriated flow of the river and an examination of the individual features which led to each component river's designation must be conducted to determine the extent of the reserved water right..... 559
29. Areas which are congressionally designated as wilderness under the Wilderness Act of Sept. 3, 1964, 78 Stat. 890, 16 U.S.C. § 1131 *et seq.* (1976), obtain reserved water rights for the maintenance of minimum stream flows and lake levels (*e.g.*, for science appreciation and primitive water-borne recreation) and for ecological maintenance (*e.g.*, evapotranspiration for natural communities, wildlife watering, fire-fighting)..... 559

STATE LAWS

1. Since Congress has not generally directed the Federal Government to comply with State water law, such compliance is required only in those specific instances where Congress has so provided, but in the converse, Congress has not prohibited the United States from voluntarily complying with such State water laws..... 554
2. State law should be followed to the greatest practicable extent in acquiring Federal water rights. This includes following State procedural law in all cases involving appropriation of non-reserved water rights and State substantive law where that law recognizes the Federal appropriate right in all pertinent respects..... 554

WATER POLLUTION CONTROL**FEDERAL WATER POLLUTION CONTROL ACT****Generally**

1. The requirement for a permit under sec. 404 of the Federal Water Pollution Control Act applies to the Bureau of Reclamation to the same extent as any other person, and with certain exceptions the Bureau must obtain a permit from the Corps of Engineers prior to any discharge of dredged or fill material into the navigable waters..... 400
2. Activities "affirmatively authorized by Congress," which are excepted from sec. 10 of the Rivers and Harbors Act of 1899, are *not* excepted from sec. 404 of the Federal Water Pollution Control Act. Notwithstanding the exception of a discharge of dredged or fill material under sec. 10 of the Rivers and Harbors Act, compliance with sec. 404 is required..... 400
3. A permit under sec. 404 of the Federal Water Pollution Control Act is required for the discharge of dredged or fill material whenever: (a) the "discharge" constitutes any addition of any pollutant to navigable waters from any discernible, confined and discrete conveyance, including the placement of fill and the building of any structure or impoundment; and (b) the "dredged material" is dredged spoil that

WATER POLLUTION CONTROL—Continued**FEDERAL WATER POLLUTION CONTROL ACT—Continued****Generally—Continued**

is excavated or dredged from the waters of the United States; or (c) the "fill material" includes any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body, including any structure which requires rock, sand, dirt or other material for its construction; and (d) the discharge is made into "waters of the United States," which extend beyond those waters meeting the traditional tests of navigability to those encompassed by the broadest possible constitutional interpretation.....	400
4. To secure the exemption under sec. 404(r) of the Federal Water Pollution Control Act for projects described in an environmental statement, compliance with seven specific conditions is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 of the Act for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.....	401
5. To secure the exemption under sec. 404(f)(1) of the Federal Water Pollution Control Act for the maintenance of currently serviceable structures, compliance with four specific conditions is required. The exemption does not apply to the discharge of dredged material incident to maintenance dredging, or to new construction.....	401

WILD AND SCENIC RIVERS ACT

1. Rivers administered by BLM that have been designated as components of the Wild and Scenic Rivers System under 16 U.S.C. §§ 1271-1287 (1976) carry with them reserved water rights sufficient to fulfill the purposes of the Act.....	557
2. The Wild and Scenic Rivers Act, 82 Stat. 917, 16 U.S.C. § 1284(c) (1976), contains an express, though negatively phrased, assertion of Federal reserved water rights.....	559
3. The extent of the water reserved for wild and scenic rivers is the amount of unappropriated water necessary to protect the particular aesthetic, recreational, scientific, biotic or historical features which led to the river's inclusion as a component of the National Wild and Scenic Rivers System, and to provide public enjoyment of such values.....	559
4. Designation of wild and scenic rivers does not automatically reserve the entire unappropriated flow of the river and an examination of the individual features which led to each component river's designation must be conducted to determine the extent of the reserved water right.....	559

WILD FREE-ROAMING HORSES AND BURROS ACT

1. Designation of lands as sanctuaries for wild, free-roaming horses and burros under the Act of Dec. 15, 1971, 16 U.S.C. § 1333 <i>et seq.</i> (1976), does not reserve water for the purposes of wild horse and burro drinking....	557
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WILDERNESS ACT

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1. Areas which are congressionally designated as wilderness under the Wilderness Act of Sept. 3, 1964, 78 Stat. 890, 16 U.S.C. § 1131 *et seq.* (1976), obtain reserved water rights for the maintenance of minimum stream flows and lake levels (*e.g.*, for science appreciation and primitive water-borne recreation) and for ecological maintenance (*e.g.*, evapo-transpiration for natural communities, wildlife watering, firefighting) -- 559

WILDLIFE REFUGES AND PROJECTS**GENERALLY**

1. The National Park Service and Fish and Wildlife Service may appropriate water to fulfill any congressionally authorized function for areas under their administration ----- 560

RIPARIAN RIGHTS

1. Executive branch reservations for native bird preserves, migratory bird refuges, game ranges, fish hatcheries, elk refuges and similar refuges and preserves reserved sufficient water needed for the maintenance of the species (*e.g.*, ecosystem food supply, breeding habitat, fire protection, domestic needs of Fish and Wildlife Service personnel) mentioned in the executive orders establishing the individual reservations... 558
2. Executive branch refuge reservations superimposed on areas previously withdrawn for powersites, reclamation or other purposes obtain reserved water rights necessary to fulfill the specific purposes for the refuge reservations ----- 559
3. Wildlife Refuge uses authorized by the Refuge Receipts Act of 1935, 49 Stat. 383, 16 U.S.C. § 715s(f) (1976); the Refuge Recreation Act of 1962, 76 Stat. 653, 16 U.S.C. §§ 460k-460k-4 (1976); and the National Wildlife Refuge Administration Act of 1966, 80 Stat. 927, 16 U.S.C. §§ 668dd-668ee (1976), such as public recreational uses, do not obtain reserved water rights under existing precedent ----- 559

WITHDRAWALS AND RESERVATIONS**GENERALLY**

1. A Native allotment applicant, who was 5 years old at the time when the land was withdrawn from all forms of appropriation, is properly deemed to be incapable as a matter of law of having exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently the allotment application is properly rejected ----- 345
2. The Board adopts the Solicitor's conclusion that Public Land Order No. 82 (Jan. 22, 1943) (8 FR 1599 (Feb. 4, 1943)) constituted an express retention for the United States of submerged lands when Alaska was admitted to the Union, and title to the submerged lands withdrawn by PLO No. 82 did not pass to the State of Alaska with statehood ---- 381

EFFECT OF

1. Public Land Order 82, issued in 1943, which withdrew from "sale, location, selection, and entry" certain described "public lands" in the Territory of Alaska, could include coastal and inland submerged lands, if such were the intent of the Order ----- 151
2. Where the language of a withdrawal order is unclear as to whether submerged lands were included in the order which withdrew certain lands in the Territory of Alaska from "sale, location, or entry," the withdrawal should be construed to carry out its intent and purpose ----- 151

WITHDRAWALS AND RESERVATIONS—Continued

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3. Where the description in the withdrawal order affecting lands in the Territory of Alaska is ambiguous, but can be interpreted to exclude coastal submerged lands, and where other evidence exists which tends to indicate that coastal submerged lands were not intended to be included in the order, the order will be construed to exclude coastal submerged lands..... 151
4. Where evidence exists that a withdrawal of certain lands in the Territory of Alaska intended to include inland submerged lands, and such submerged lands are not specifically excepted from the withdrawal, the withdrawal will be construed to include inland submerged lands..... 151
5. Where submerged lands were included in a withdrawal order in Alaska, which was in effect at the time the State entered the Union, even though such submerged lands were not specifically described in the withdrawal order, such submerged lands would not pass to the State at statehood pursuant to sec. 5(a) of the Submerged Lands Act..... 151
6. The subsequent revocation of a withdrawal of submerged lands which prevented the State from acquiring title to such lands at statehood pursuant to sec. 5(a) of the Submerged Lands Act, has no effect on the ownership of the lands contained in the withdrawal..... 151
7. Where the coastal submerged lands in the Arctic National Wildlife Refuge were segregated by an application for a withdrawal filed by the Fish and Wildlife Service in Jan. 1958; 1 year before Alaska statehood, such application operated as an express retention of the lands at statehood under the Submerged Lands Act, and prevented passage of title of the coastal submerged lands to the State..... 151
8. A Native allotment applicant, who was 5 years old at the time when the land was withdrawn from all forms of appropriation, is properly deemed to be incapable as a matter of law of having exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently the allotment application is properly rejected..... 345

POWERSITES

1. The withdrawals of lands for powersites under 43 U.S.C. § 141 (1970) do not carry with them reserved water rights for purposes under the administration of the Department of the Interior, simply because of their reservation as a powersite..... 557

SPRING AND WATERHOLES

Generally

1. For purposes of the Executive Order of Apr. 17, 1926, the term "spring" means a discrete natural flow of water emerging from the earth at a reasonably distinct location, whether or not such flow constitutes a source of or is tributary to a water course, pond, or other body of surface water. The term "waterhole" means a dip or hole in the earth's surface where surface or groundwater collects and which may serve as a watering place for man or animals..... 555
2. The Executive Order withdrew, as of Apr. 17, 1926, all lands containing important springs and waterholes that existed as of that date on unappropriated, unreserved public lands..... 555

WITHDRAWALS AND RESERVATIONS—Continued

SPRING AND WATERHOLES—Continued

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3. The Executive Order does not withdraw artificially developed sources of water or manmade structures for collection of water on the public domain. However, any interest held in those artificially developed or constructed sources or structures passes to the United States upon abandonment by the developer or his successor in interest by virtue of the United States' ownership of the land..... 555
4. The Executive Order withdraws, by operation of law, lands which become of the character contemplated in the Order subsequent to the date of the Order; *i.e.*, vacant, unappropriated, unreserved public lands upon which springs or waterholes come into existence after Apr. 17, 1926..... 556
5. The Executive Order withdraws all lands containing springs or waterholes as defined and subject to the limitations set forth above, regardless of whether the water source has been the subject of an official finding as to its existence and location..... 556
6. The priority date for the public right to use the waters of a spring or waterhole withdrawn under the Order is Apr. 17, 1926, for all public springs and waterholes existing on that date. Those public springs and waterholes that naturally come into existence at a later date are withdrawn when they come into existence..... 556
7. The purposes for which water is reserved under the 1926 Order are (a) stockwatering, (b) human consumption, (c) agriculture and irrigation, including sustaining fish, wildlife and plants as a food and forage source, and (d) flood, soil, fire and erosion control..... 556
8. Because the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.* (1976), repealed both authorizing statutes under which the Apr. 17, 1926, Order was issued, springs and waterholes on the public domain coming into existence after Oct. 21, 1976, are not withdrawn by the Apr. 17, 1926, Order but must be withdrawn under other, still existing legislative authority to be effective..... 556

Rights-of-Way

1. Any action taken by private party who did not have a vested State water right prior to Apr. 17, 1926, or had not received appropriate permission from the United States subsequent to that date to make use of the public waterhole or spring withdrawn by the Order is a nullity and of no force and effect. Any entry onto the reserved land for such purpose constitutes a trespass..... 556

State Laws

1. The Executive Order does not affect a valid, private right to use some or all of the waters of such a source that vested under the applicable State laws, custom or usage prior to Apr. 17, 1926..... 555
2. The Executive Order withdraws, by operation of law, any vacant, unappropriated, unreserved public land upon which is located a spring or waterhole and for which a private vested right to use all of such water under applicable State law, custom and usage has previously existed upon abandonment or forfeiture of that State water right under the terms of the applicable State law, custom or usage..... 556

WITHDRAWALS AND RESERVATIONS—Continued

STOCK-DRIVEWAY WITHDRAWALS

Page

1. Water sources located within stock driveways and reserved pursuant to sec. 10 of the Act of Dec. 29, 1916, 43 U.S.C. § 300 (1970), are reserved to the extent necessary to provide for stockwatering during the process of moving livestock through these reserved access corridors---

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WORDS AND PHRASES

1. "*Interest in an oil and gas lease or offer.*" If an oil and gas lease offeror in an oral agreement gives another person "a claim or any prospective or future claim to an advantage or benefit from a lease," there would be an interest in the lease or lease offer which must be disclosed under 43 CFR 3102.7. That an offeror might raise a technical legal defense against enforcement of such an agreement in a court does not militate against there being a claim or avoid the consequence of the disclosure regulation or 43 CFR 3112.5-2 prohibiting multiple filing in drawing procedures-----
2. "*Interest in an oil and gas lease or offer.*" Where affidavits submitted on appeal by an oil and gas lease offeror disclose that prior to the filing of an oil and gas lease offer the offeror orally agreed to give the person filing the offer for him either the opportunity to refuse to purchase the lease under terms and conditions that a third party would make (right of first refusal), or the opportunity to make the first offer before any other offer would be accepted (first right to buy), the offeror has given the person an interest in the offer as defined in the regulations to include a prospective claim to an advantage or benefit from a lease-----
3. "*Person.*" A State is a "person" within the meaning of the Department's private contest regulations-----

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